# APPENDIX

# APPENDIX A1

FILED: June 20, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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**No. 18-4688**
**(1:16-cr-00324-JKB-2)**

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UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ATIF BABAR MALIK,

Defendant - Appellant.

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O R D E R

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Atif Babar Malik seeks to appeal his convictions for conspiracy to violate the Anti-Kickback Act and the Travel Act and violating the Travel Act. The Government has moved to dismiss the appeal as barred by Malik's waiver of the right to appeal included in the plea agreement.

Upon review of the record, Malik's appellate brief, and the submissions relative to the Government's motion to dismiss the appeal, we conclude that Malik knowingly and voluntarily waived his right to appeal and that the challenge he seeks to raise on appeal

falls squarely within the compass of the valid and enforceable appeal waiver. Accordingly, we grant the Government's motion to dismiss the appeal.

Entered at the direction of the panel: Judge Harris, Judge Richardson, and Judge Quattlebaum.

For the Court

/s/ Patricia S. Connor, Clerk

# APPENDIX A2

**U.S. Department of Justice**

*United States Attorney*
*District of Maryland*

*Jefferson M. Gray*
*Assistant United States Attorney*
*Jefferson.M.Gray@usdoj.gov*

*Suite 400*
*36 S. Charles Street*
*Baltimore, MD 21201-3119*

*DIRECT: 410-209-4915*
*MAIN: 410-209-4800*
*FAX: 410-962-3091*

June 18, 2018



Mr. Michael E. Lawlor, Esq.
Mr. William C. Brennan, Jr.
Brennan, McKenna, & Lawlor, Chartered
6305 Ivy Lane, Suite 700
Greenbelt, MD 20770

Re: *United States v. Atif Babar Malik*
Criminal No. MJG-16-0324

Dear Counsel:

This letter, together with the Sealed Supplement, confirms the plea agreement that has been offered to the Defendant by the United States Attorney's Office for the District of Maryland ("this Office" or "the Government"). If the Defendant accepts this offer, please have him execute it in the spaces provided below. If this offer has not been accepted by the close of business on Friday, June 22nd, it will be deemed withdrawn. The terms of the agreement are as follows.

## Offense of Conviction

1. The Defendant agrees to plead guilty to Count Eighteen of the Superseding Indictment, which charges him with Conspiracy to Defraud the United States, in violation of 18 U.S.C. § 371. The Defendant admits that he is, in fact, guilty of that offense and will so advise the Court.[1]

[1] In addition to this charge, the Defendant was previously convicted at trial on October 27, 2017 on one count charging him with conspiracy to violate the Anti-Kickback Act and the Travel Act, in violation of 18 U.S.C. § 371; twelve counts charging him with soliciting and receiving illegal health care-related kickbacks, in violation of 42 U.S.C. § 1320a-7b(b)(1)(A); three counts charging him with violations of the Travel Act, in violation of 18 U.S.C. § 1952(a)(1) & (3); six counts charging him with health care fraud, in violation of 18 U.S.C. § 1347; and three counts charging him with false statements relating to health care matters, in violation of 18 U.S.C. § 1035(a)(1) & (a)(2). ECF # 272. As part of this plea agreement, the Defendant is also stipulating to the applicability of various factors that are pertinent to the calculation of his offense level as to these

## Elements of the Offense

2. The elements of the offense to which the Defendant has agreed to plead guilty, and which this Office would prove if the case went to trial as scheduled in September 2018, are as follows.

### Count Eighteen: Conspiracy to Defraud the United States

- First, that two or more persons agreed to defraud the United States, which means to cheat the United States government or any of its agencies out of money or property, or to obstruct or interfere with one of the United States' government's lawful functions by deceit, craft, trickery, or dishonest means;

- Second, that the Defendant knowingly and voluntarily became a member of the conspiracy; and

- Third, that a member of the conspiracy did one of the overt acts described in the Superseding Indictment for the purpose of advancing or furthering the objectives of the conspiracy.

## Penalties

3. The maximum sentence provided by statute for the offense in Count Eighteen to which the Defendant is pleading guilty is as follows: imprisonment for five (5) years, followed by a three (3) year term of supervised release, and a fine of up to $250,000.00, or (pursuant to 18 U.S.C. § 3571(d)), the greater of twice the Defendant's gross gain or the victims' gross loss). In addition, the Defendant must pay $100.00 as a special assessment pursuant to 18 U.S.C. § 3013, which will be due and should be paid at or before the time of sentencing. This Court may also order him to make restitution pursuant to 18 U.S.C. §§ 3663, 3663A, and 3664. If a fine or restitution is imposed, it shall be payable immediately, unless, pursuant to 18 U.S.C. § 3572(d), the Court orders otherwise.[2] The Defendant understands that if he serves a term of imprisonment, is released on supervised release, and then violates the conditions of his supervised

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previous convictions under the Federal Sentencing Guidelines, as set forth in ¶ 6 below, and is agreeing to withdraw his post-trial motions as set forth in ¶ 16 and to waive his appellate rights in regard to these convictions except in certain limited circumstances, as set forth in ¶ 17.

[2] Pursuant to 18 U.S.C. § 3612, if the Court imposes a fine in excess of $2,500 that remains unpaid 15 days after it is imposed, the Defendant shall be charged interest on that fine, unless the Court modifies the interest payment in accordance with 18 U.S.C. § 3612(f)(3).

release, his supervised release could be revoked -- even on the last day of the term -- and the Defendant could be returned to custody to serve another period of incarceration and a new term of supervised release. The Defendant understands that the Bureau of Prisons has sole discretion in designating the institution at which the Defendant will serve any term of imprisonment imposed.

**Waiver of Rights**

4. The Defendant understands that by entering into this agreement, he surrenders certain rights as outlined below:

a. If the Defendant had persisted in his plea of not guilty, he would have had the right to a speedy jury trial with the close assistance of competent counsel. That trial could be conducted by a judge, without a jury, if the Defendant, this Office, and the Court all agreed.

b. If the Defendant elected a jury trial, the jury would be composed of twelve individuals selected from the community. Counsel and the Defendant would have the opportunity to challenge prospective jurors who demonstrated bias or who were otherwise unqualified, and would have the opportunity to strike a certain number of jurors peremptorily. All twelve jurors would have to agree unanimously before the Defendant could be found guilty of any count. The jury would be instructed that the Defendant was presumed to be innocent, and that presumption could be overcome only by proof beyond a reasonable doubt.

c. If the Defendant went to trial, the government would have the burden of proving the Defendant guilty beyond a reasonable doubt. The Defendant would have the right to confront and cross-examine the government's witnesses. The Defendant would not have to present any defense witnesses or evidence whatsoever. If the Defendant wanted to call witnesses in his defense, however, he would have the subpoena power of the Court to compel the witnesses to attend.

d. The Defendant would have the right to testify in his own defense if he so chose, and he would have the right to refuse to testify. If he chose not to testify, the Court could instruct the jury that they could not draw any adverse inference from his decision not to testify.

e. If the Defendant were found guilty after a trial, he would have the right to appeal the verdict and the Court's pretrial and trial decisions on the admissibility of evidence to see if any errors were committed which would require a new trial or dismissal of the charges against him. By pleading guilty, the Defendant knowingly gives up the right to appeal the verdict and the Court's decisions.

f. By pleading guilty, the Defendant will be giving up all of these rights, except the right, under the limited circumstances set forth in the "Waiver of

Appeal" paragraph below, to appeal the sentence. By pleading guilty, the Defendant understands that he may have to answer the Court's questions both about the rights he is giving up and about the facts of his case. Any statements the Defendant makes during such a hearing would not be admissible against him during a trial except in a criminal proceeding for perjury or false statement.

g. If the Court accepts the Defendant's plea of guilty, there will be no further trial or proceeding of any kind, and the Court will find him guilty.

h. By pleading guilty, the Defendant will also be giving up certain valuable civil rights and may be subject to deportation or other loss of immigration status. The Defendant recognizes that if he is not a citizen of the United States, pleading guilty may have consequences with respect to his immigration status. Under federal law, conviction for a broad range of crimes can lead to adverse immigration consequences, including automatic removal from the United States. Removal and other immigration consequences are the subject of a separate proceeding, however, and the Defendant understands that no one, including his attorney or the Court, can predict with certainty the effect of a conviction on immigration status. Defendant nevertheless affirms that he wants to plead guilty regardless of any potential immigration consequences.

## Advisory Sentencing Guidelines Apply

5. The Defendant understands that the Court will determine a sentencing guidelines range for this case (henceforth the "advisory guidelines range") pursuant to the Sentencing Reform Act of 1984 at 18 U.S.C. §§ 3551-3742 (excepting 18 U.S.C. §§ 3553(b)(1) and 3742(e)) and 28 U.S.C. §§ 991 through 998. The Defendant further understands that the Court will impose a sentence pursuant to the Sentencing Reform Act, as excised, and must take into account the advisory guidelines range in establishing a reasonable sentence.

## Factual and Advisory Guidelines Stipulation

6. This Office and the Defendant understand, agree and stipulate to the Statement of Facts set forth in Attachment A hereto, which the Defendant acknowledges accurately summarizes the evidence previously presented by the government at his trial in October 2017, or that the government could present at his sentencing hearing in regard to his previous counts of conviction at trial. The Defendant further agrees and stipulates that this Office could prove the facts set forth in Attachment A relating to the charge of conspiracy to defraud the United States beyond a reasonable doubt if this matter proceeded to trial with regard to Count 18, and to the following applicable sentencing guidelines factors. (As indicated below and in more detail in ¶ 9, there are also certain issues about which the parties do *not* agree, and which will have to be resolved by the Court at sentencing after hearing evidence presented by the parties and the arguments of counsel.)

With regard to Counts One (Conspiracy to Solicit and Receive Health Care Kickbacks and to violate the Travel Act) and Counts Two through Fourteen, Sixteen, and Seventeen, the parties agree that U.S.S.G. § 2B4.1 (Commercial Bribery and Kickbacks) is the applicable guideline provision. The base offense level in this case is a level **eight (8)**, pursuant to U.S.S.G. § 2B4.1(a). The parties agree that the net benefit received by Accu Reference Medical Lab, LLC as a result of the referrals-for-kickbacks scheme was approximately $3.350 million, so an enhancement of **sixteen (16)** levels is added pursuant to § 2B1.1(b)(1)(I). Thus, the parties agree that the Defendant's offense level for Counts One through Fourteen, as well as Counts Sixteen and Seventeen, will be at least a **twenty-four (24)**. (As noted in ¶ 9, below, the parties disagree on whether a further **two (2)** level enhancement for abuse of a abuse of position of trust pursuant to U.S.S.G. § 3B1.3 is appropriate here.)

With regard to Count Eighteen (Conspiracy to Defraud the United States), the applicable Guidelines provisions are U.S.S.G. § 2T1.9(a) (Conspiracy to Impede, Impair, Obstruct, or Defeat Tax), § 2T1.1 (Tax Evasion), and § 2T4.1 (Tax Table). The Defendant agrees that he conspired with his partner, Dr. Sandeep Sherlekar, and with Muhammad Khan and Vic Wadhwa, the Chief Executive Officer and Chief Financial Officer of his medical practice, to collect and not report cash payments that were received from patients of the practice from 2009-2012. The Defendant agrees that the total amount of the unreported cash proceeds received by him and his partner Dr. Sherlekar over those four years totaled approximately $902,882.

The Defendant further agrees that he and Dr. Sherlekar failed to report on their federal tax returns $333,352 in illegal kickback payments[3] that were paid to them in 2011-12 by Accu Reference, a testing laboratory located in New Jersey, in return for the referrals of urine toxicology specimens submitted by patients of their medical practice at the direction of its physicians. When these funds are added to the unreported total of the diverted cash proceeds, the combined total of the unreported income

[3] The total amount of the kickback payments received by Defendant Malik and Dr. Sherlekar was $484,091. Out of this amount, $84,852 in payments received in the year 2011 was reported by the corrupt accountant Carlyle Fraser on Defendant Malik's tax return and $67,852 was reported by Fraser on Dr. Sherlekar's tax return for those tax years. However, in each case, Fraser then backed these funds out in another portion of each return, so that neither amount was included in the calculation of the respective doctor's taxable income, and thus neither doctor ultimately paid any taxes on the amount of the kickback funds that he received during the calendar year 2011.

received by Defendant Malik and Dr. Sherlekar from these two sources is $1,236,334.

In addition to the methods of tax evasion referenced above, Drs. Sherlekar and Malik relied upon a corrupt New Jersey accountant, Carlyle Fraser, to prepare fraudulent tax returns for APMS/ASC and their other related entities, in which Fraser overstated expenses and understated revenues for these businesses, thereby reducing the income that flowed through to the doctors' personal tax returns. For the period 2009-2012, with Fraser's assistance, Dr. Sherlekar fraudulently underreported his taxable income from all sources by approximately $2,906,074.00, and he therefore owed an additional $1,029,661 in federal income taxes for these four years. Defendant Malik fraudulently underreported his taxable income from all sources by approximately $3,374,997.00 by employing similar fraudulent practices, and he therefore owes an additional $1,157,712.00 in taxes, making the combined tax loss from the doctors' and their confederates' conspiracy to defraud the United States $2,187,373. Because that amount is in excess of $1.5 million but less than $3.5 million, the base offense level for the tax offense (Count Eighteen) is a level **twenty-two (22)**, pursuant to § 2T1.1(a)(1) and § 2T4.1(I).

A further **two (2)** level increase is added for the Specific Offense Characteristic of "sophisticated means" pursuant to U.S.S.G. § 2T1.1(b)(2) & comment. (n.5), because this tax evasion conspiracy involved unusually sophisticated efforts to conceal the offense, including but not limited to the use of shell entities in connection with the kickback scheme; the diversion of revenues from APMS to Efficient Management; and the use of a corrupt accountant and former IRS revenue agent who employed his expertise to figure out how best to overstate the business expenses of various APMS-related entities and to understate their profits. Thus, the Defendant's offense level on Count Eighteen will be at least a level **twenty-four (24).** (The parties disagree about whether the Specific Offense Characteristic enhancement of **two (2)** levels set forth in U.S.S.G. § 2T1.1(b)(1) for failure to report more than $10,000 in income derived from criminal activity applies here because Defendant Malik failed to report approximately $190,000 derived from the criminal activity of unlawful kickbacks on his tax return for 2012.)

With regard to Counts Nineteen through Twenty-Four (Health Care Fraud) and Counts Twenty-Five through Twenty-Seven (False Statements Relating to Health Care Matters), the parties agree that U.S.S.G. § 2B1.1 is the applicable guideline provision, and that the base offense level is a **six (6)** pursuant to § 2B1.1(a)(2). The parties further agree that a reasonable estimate of the attempted and actual loss suffered by the government and private insurers over the charged time period of the scheme between early

2009 and August 2012 is at least $175,000.00, so a further Specific Offense Characteristic enhancement of **ten (10)** levels applies pursuant to § 2B1.1(b)(1)(F). The parties accordingly agree that the Defendant's offense level for Counts Nineteen through Twenty-Seven prior to application of the grouping rules or any reductions will be at least a level **sixteen (16).** (The parties disagree about whether the Defendant is further subject to a **two (2)** level enhancement pursuant to U.S.S.G. § 3B1.3 because he abused a position of both public and private trust in regard to these charges, and is also subject to another **two (2)** level enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1 arising out of his false statements to U.S. Marshal Johnny Hughes and Assistant U.S. Attorney James G. Warwick after he disavowed the assertions he made in his email to Marshal Hughes on August 23, 2012, as well as his attempts to discourage Staci Decker, Terri Cohen, and Jennifer Toms from continuing their efforts to alert law enforcement about APMS/ASC's fraudulent practices in regard to billing for anesthesia services.

Because the three main categories of offenses do not involve substantially the same harm under U.S.S.G. § 3D1.2, none of them group together. As noted above and in ¶ 9, the parties are disputing the applicability of the abuse of position of trust, obstruction of justice, and more than $10,000 in unreported income derived from criminal activity in a particular year, the calculation of the defendant's ultimate final offense level will have to be determined at sentencing.

Under the circumstances of this case, where it is the Government's view that the Defendant attempted to obstruct justice (see U.S.S.G. § 3E1.1, comment. (n.4)) and contested his guilt at trial on the other 26 counts of the Superseding Indictment, and where the Government has already presented evidence in court relating to certain components of the tax evasion conduct (the cash skim and the unlawful kickbacks), the Government will not stipulate to a reduction for Acceptance of Responsibility under U.S.S.G. § 3E1.1 based upon his guilty plea to the single charge of conspiracy to defraud the United States. However, the defense may present arguments to the Court in support his receiving of some type of reduction based upon his guilty plea to this single count. See ¶ 9.

7. The Defendant understands that there is no agreement as to his criminal history or criminal history category, and that his criminal history could alter his offense level if he is a career offender or if the instant offense was a part of a pattern of criminal conduct from which he derived a substantial portion of his income.

8. This Office and the Defendant agree that, other than the matters set forth in ¶ 9 below, there are no other facts or sentencing guideline calculations relating to the

Defendant's offenses of conviction that are in dispute, and, accordingly, with respect to the calculation of the advisory guidelines range, no other offense characteristics, sentencing guidelines factors, potential departures or adjustments set forth in the United States Sentencing Guidelines will be raised or are in dispute. Both parties remain free to argue the applicability of the various sentencing considerations set forth in 18 U.S.C. § 3553(a).

**Guideline Factors Remaining in Dispute**

9. (a) As noted above, the Government submits that the Defendant's offense level under the Sentencing Guidelines for his convictions on the kickbacks and health care fraud should both be enhanced by two levels because the Defendant abused a position of both public and private trust, and is therefore subject to a **two (2)** level enhancement pursuant to U.S.S.G. § 3B1.3.

The Government further submits that, on Count 18, the charge of Conspiracy to Defraud the United States, the Defendant should receive the specific offense characteristic enhancement of **two (2)** levels set forth in U.S.S.G. § 2T1.1(b)(1) for failure to report more than $10,000 in income derived from criminal activity applies here because Defendant Malik failed to report approximately $190,000 derived from the criminal activity of unlawful kickbacks on his tax return for 2012.

Finally, the Government submits that with respect to his convictions on the health care fraud and false medical records counts, the Defendant is subject to a **two (2)** level enhancement pursuant to U.S.S.G. § 3B1.3 because he abused a position of both public and private trust in regard to these charges, and is also subject to another **two (2)** level enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1 arising out of his false statements to U.S. Marshal Johnny Hughes and Assistant U.S. Attorney James G. Warwick after he disavowed the assertions he made in his email to Marshal Hughes on August 23, 2012, as well as his attempts to discourage Staci Decker, Terri Cohen, and Jennifer Toms from continuing their efforts to alert law enforcement about APMS/ASC's fraudulent practices in regard to billing for anesthesia services.

With respect to the operation of the Grouping rules, the Government's view is that pursuant to U.S.S.G. § 3D1.4, the offense level for the kickback-related charges has the highest offense level at **twenty-six (26)**. The offense level **(26)** for the charge of conspiracy to defraud the United States is equally serious, so that counts as one (1) additional unit pursuant to § 3D1.4(a). The offense level for the health care fraud/false statements group **(20)** is six levels less serious than that of the highest two groups, so that would count as 1/2 additional unit pursuant to § 3D1.4(b). Because there are therefore two-and-one-half units, pursuant to § 3D1.4, **three (3)** levels are added to the current highest offense level, thus producing a combined offense level of **twenty-nine (29)**.

(b) As noted previously, the Defendant maintains that the three additional enhancements set forth in ¶ 9(a) are not merited. The Defendant may also present any arguments he wishes to the Court concerning whether he is entitled to some type of reduction in his final adjusted offense level or other consideration based upon the Guidelines' provision relating to Acceptance of Responsibility (U.S.S.G. § 3E1.1), as a result of his guilty plea to the tax evasion count, as well as his agreement to waive any appellate rights with regard to the offenses of which he was convicted at trial. This Office will be free to oppose any such arguments and, indeed, anticipates that it will do so.

With respect to the operation of the Grouping rules, leaving aside any additional reduction the Defendant might receive for acceptance of responsibility, pursuant to U.S.S.G. § 3D1.4, the Defendant maintains that the offense level for the kickback-related charges is the highest at **twenty-four (24)**. The Defendant contends that the offense level for the charge of conspiracy to defraud the United States would be a **twenty-four (24)** and thus equally serious, so that counts as one (1) additional unit pursuant to § 3D1.4(a). The Defendant submits that the offense level for the health care fraud/false statements group would be a level **sixteen (16)** and is thus eight levels less serious than that of the highest two groups, so that counts as 1/2 additional unit pursuant to § 3D1.4(b). Because there are therefore two-and-one-half units, pursuant to § 3D1.4, **three (3)** levels are added to the current highest offense level, thus producing a combined offense level of **twenty-seven (27)**.

## Obligations of the United States Attorney's Office

10. At the time of sentencing, this Office will recommend that the Defendant receive a sentence of incarceration that is sufficient, but not greater than necessary, to comply with all of the purposes of the Sentencing Reform Act as set forth in 18 U.S.C. § 3553(a), as well as a three-year term of supervised release, an order of restitution or forfeiture, and an appropriate fine, if he has the ability to pay one.

11. The parties reserve the right to bring to the Court's attention at the time of sentencing, and the Court will be entitled to consider, all relevant information concerning the Defendant's background, character and conduct pursuant to 18 U.S.C. § 3661. This specifically includes, but is not limited to, other conduct, patient treatment, and billing practices occurring at APMS/ASC that the government learned about during its investigation, but that were not the subject of criminal charges brought as part of the original or Superseding Indictment.

## Forfeiture

12. The Defendant understands that the Court will, prior to or in connection with the sentencing proceeding in this matter, enter an order of forfeiture as part of his sentence, and that the order will include property and assets that constitutes or were derived, directly or indirectly, from the gross proceeds that were traceable to the

commission of his offense, substitute assets, and/or a money judgment equal to the value of the property subject to forfeiture, pursuant to 18 U.S.C. § 982(a)(7).

13. The Defendant agrees to consent to the entry of orders of forfeiture for such property and waives the requirements of Federal Rules of Criminal Procedure 11(b)(1)(J), 32.2 and 43(a) regarding notice of the forfeiture in the charging instrument, advice regarding the forfeiture at the change-of-plea hearing, announcement of the forfeiture at sentencing, and incorporation of the forfeiture in the judgment.

**Assisting the Government with Regard to the Forfeiture**

14. The Defendant agrees to assist fully in the forfeiture of the aforementioned assets. The Defendant agrees to disclose all of his assets and sources of income to the United States, and to take all steps necessary to pass clear title to the forfeited assets to the United States, including but not limited to executing any and all documents necessary to transfer such title, assisting in bringing any assets located outside of the United States within the jurisdiction of the United States, and taking whatever steps are necessary to ensure that assets subject to forfeiture are not sold, disbursed, wasted, hidden or otherwise made unavailable for forfeiture. The Defendant also agrees to give this Office permission to request and review his federal and state income tax returns, and any credit reports maintained by any consumer credit reporting entity, until such time as the money judgment is satisfied. In this regard, the Defendant agrees to complete and sign a copy of IRS Form 8821 (relating to the voluntary disclosure of federal tax return information) as well as whatever disclosure form may be required by any credit reporting entity. The Defendant further agrees to provide the United States with an affidavit identifying all of his sources of income and all assets in which he any form of ownership or beneficial interest.

**Waiver of Further Review of Forfeiture**

15. The Defendant further agrees to waive all constitutional, legal and equitable challenges (including direct appeal, habeas corpus, or any other means) to any forfeiture carried out in accordance with this Plea Agreement on any grounds, including that the forfeiture constitutes an excessive fine or punishment. The Defendant also agrees not to challenge or seek review of any civil or administrative forfeiture of any property subject to forfeiture under this agreement, and will not assist any third party with regard to such challenge or review or with regard to the filing of a petition for remission of forfeiture.

**Waiver of Appeal**

16. In exchange for the concessions made by this Office and the Defendant in this plea agreement, this Office and the Defendant waive their rights to appeal as follows:

a. The Defendant knowingly waives all right, pursuant to 28 U.S.C. § 1291 or otherwise, to appeal the Defendant's conviction as to Count Eighteen or any of the counts on which he was convicted at trial (Counts One through Fourteen, Sixteen through Seventeen, and Nineteen through Twenty-Seven) on any ground whatsoever. This includes a waiver of all right to appeal the Defendant's conviction on the ground that the statute to which the Defendant is pleading guilty is unconstitutional, or on the ground that the admitted conduct does not fall within the scope of the statute.

b. The Defendant and this Office knowingly waive all right, pursuant to 18 U.S.C. § 3742 or otherwise, to appeal whatever sentence is imposed on him (including any term of imprisonment, fine, term of supervised release, or order of restitution) in this case on all of his counts of conviction, both from the trial and from this plea agreement, for any reason (including any issues that relate to the establishment of the advisory guidelines range, the determination of the Defendant's criminal history, the weighing of the sentencing factors, and any constitutional challenges to the calculation and imposition of any term of imprisonment, fine, order of forfeiture, order of restitution, and term or condition of supervised release).

c. Nothing in this agreement shall be construed to prevent the Defendant or this Office from invoking the provisions of Federal Rule of Criminal Procedure 35(a), or from appealing from any decision thereunder, should a sentence be imposed that resulted from arithmetical, technical, or other clear error.

d. The Defendant waives any and all rights under the Freedom of Information Act relating to the investigation and prosecution of the above-captioned matter and agrees not to file any request for documents from this Office or any investigating agency.

## Obstruction or Other Violations of Law

17. The Defendant agrees that he will not commit any offense in violation of federal, state or local law between the date of this agreement and his sentencing in this case. In the event that the Defendant (i) engages in conduct after the date of this agreement which would justify a finding of obstruction of justice under U.S.S.G. § 3C1.1, or (ii) fails to accept personal responsibility for his conduct by failing to acknowledge his guilt to the probation officer who prepares the Presentence Report, or (iii) commits any offense in violation of federal, state or local law, then this Office will be relieved of its obligations to the Defendant as reflected in this agreement. Specifically, this Office will be free to argue sentencing guidelines factors other than those stipulated in this agreement, and it will also be free to make sentencing recommendations other than those set out in this agreement. As with any alleged breach of this agreement, this Office will bear the burden of convincing the Court of the Defendant's obstructive or unlawful behavior and/or failure to acknowledge personal responsibility by a preponderance of the evidence. The Defendant acknowledges that he may not withdraw his guilty plea

because this Office is relieved of its obligations under the agreement pursuant to this paragraph.

**Court Not a Party**

18. The Defendant expressly understands that the Court is not a party to this agreement. In the federal system, the sentence to be imposed is within the sole discretion of the Court. In particular, the Defendant understands that neither the United States Probation Office nor the Court is bound by the stipulation set forth above, and that the Court will, with the aid of the Presentence Report, determine the facts relevant to sentencing. The Defendant understands that the Court cannot rely exclusively upon the stipulation in ascertaining the factors relevant to the determination of sentence. Rather, in determining the factual basis for the sentence, the Court will consider the stipulation, together with the results of the presentence investigation, and any other relevant information. The Defendant understands that the Court is under no obligation to accept this Office's recommendations, and the Court has the power to impose a sentence up to and including the statutory maximum stated above. The Defendant understands that if the Court ascertains factors different from those contained in the stipulation set forth above, or if the Court should impose any sentence up to the maximum established by statute, the Defendant cannot, for that reason alone, withdraw his guilty plea, and will remain bound to fulfill all of his obligations under this agreement. The Defendant understands that neither the prosecutor, his counsel, nor the Court can make a binding prediction, promise, or representation as to what guidelines range or sentence the Defendant will receive. The Defendant agrees that no one has made such a binding prediction or promise.

**Entire Agreement**

19. This letter supersedes any prior understandings, promises, or conditions between this Office and the Defendant and, together with the Sealed Supplement, constitutes the complete plea agreement in this case. The Defendant acknowledges that there are no other agreements, promises, undertakings or understandings between the Defendant and this Office other than those set forth in this letter and the Sealed Supplement and none will be entered into unless in writing and signed by all parties.

If the Defendant fully accepts each and every term and condition of this agreement, please sign and have the Defendant sign the original and return it to me promptly.

Very Truly Yours,

ROBERT K. HUR
UNITED STATES ATTORNEY

By: _____
Jefferson M. Gray
Sean R. Delaney
Assistant United States Attorneys

I have read this agreement, including the Sealed Supplement, and carefully reviewed every part of it with my attorneys. I understand it, and I voluntarily agree to it. Specifically, I have reviewed the Factual and Advisory Guidelines Stipulation with my attorneys, and I do not wish to change any part of it. I am completely satisfied with the representation of my attorneys.

6/25/18
Date

_____
Atif Babar Malik, M.D.

We are Dr. Malik's attorneys. We have carefully reviewed every part of this agreement, including the Sealed Supplement, with him. He advises us that he understands and accepts its terms. To our knowledge, his decision to enter into this agreement is an informed and voluntary one.

6/25/18
Date

_____
Michael E. Lawlor

_____
William C. Brennan, Jr.

**ATTACHMENT A**

*Defendant Atif Babar Malik stipulates and agrees that the following facts are true, correct, and accurate. He further stipulates and agrees that if Count 18 of the Indictment, which charges him with Conspiracy to Defraud the United States, had proceeded to trial, the Government would have been able to present testimonial and documentary evidence sufficient to establish the facts set forth below beyond a reasonable doubt.*

Defendant Atif Malik is a physician who specializes in the treatment of pain management. Following the completion of his residency and a fellowship, Dr. Malik commenced the private practice of medicine in 2003. Between 2003 and early 2009, he was a partner in, or was the founder and owner of, various pain management or sports medicine practices. By 2008, he was dividing his time between practices he had established in both the Germantown, Maryland area and northern New Jersey. In February 2009 Dr. Malik merged his pain management practices in both Maryland and New Jersey with the Frederick-based practice of Dr. Sandeep Sherlekar. Drs. Malik's and Sherlekar's new combined Maryland practice was originally known as Advanced Pain Management Services (APMS), but in the summer of 2010 it began doing business under the name of American Spine Center (ASC). (The two doctors' pain management practice will hereafter be referred to as "APMS/ASC" or "the practice.")

In the years after Drs. Malik and Sherlekar merged their practices, APMS/ASC experienced rapid growth. By early 2012, the practice was operating a number of offices in central Maryland and the Washington, D.C. metropolitan area. A friend of Dr. Malik's named Muhammad Khan was hired to be the Chief Executive Officer (CEO) for the practice, and in late 2009 Vic Wadhwa was hired to be its Chief Financial Officer (CFO). Wadhwa was also assigned to spend one to two days a week handling

administrative tasks at another medical practice in New Jersey called Alpine Medical, in which Drs. Malik and Sherlekar had made a substantial investment.

Dr. Malik was previously convicted at trial on one count of Conspiracy to violate the Anti-Kickback Act and the Travel Act; 12 counts charging substantive violations of the Anti-Kickback Act and the Travel Act; and three counts charging violations of the Travel Act in connection with an unlawful scheme whereby APMS agreed to refer all of the urine toxicology specimens it ordered its patients to submit to Accu Reference Medical Lab LLC, a a New Jersey testing lab, for testing.

Over the period between April 11, 2011 and August 20, 2012 when the kickback arrangement between APMS/ASC and Accu Reference was in effect, Dr. Malik received the following payments of kickback funds that originated with Accu Reference:

| CHECK OR TRANSFER DATE | PAYOR | CHECK OR TRANSFER AMOUNT | OTHER NOTES |
|---|---|---|---|
| 7/1/2011 | Monaco Consulting | $17,027.50 | Only check directly from Monaco to Malik |
| 9/12/2011 | Efficient Management | $22,000 | Included a $4,000 payment for back braces as well |
| 10/10/2011 | Efficient Management | $22,000 | Included a $10,000 payment for back braces as well |
| 11/3/2011 | Efficient Management | $11,865 | |
| 12/14/2011 | Efficient Management | $11,987.50 | |
| 1/4/2012 | Efficient Management | $16,906 | |

| | | | |
|---|---|---|---|
| 2/2/2012 | APMS | $13,500 | This check was drawn on the APMS account by mistake, and was subsequently covered by a check in the same amount from Efficient to APMS on 2/24/2012 |
| 2/27/2012 | Efficient Management | $17,000 | This was a make-up for a September 2011 kickback payment to Malik that was never cashed; thus, the memo line says "September 2011 payment" |
| 2/29/2012 | Efficient Management | $13,877.50 | Memo line says "February 2012 Rebate" |
| 4/4/2012 | Efficient Management | $19,950 | |
| 5/1/2012 | Efficient Management | $15,680 | |
| 5/30/2012 | Efficient Management | $16,590 | |
| 7/13/2012 | Efficient Management | $23,940 | Memo line says "Rebate" |
| 8/20/2012 | Efficient Management | $19,652.50 | Memo line says "Rebate" |
| **TOTAL:** | | **$241,976** | |

Dr. Malik's partner Dr. Sherlekar received kickback payments totaling $242,115 that originated with Accu Reference.

**The Conspiracy to Defraud the United States by Obstructing and Defeating the Lawful Functions of the IRS (Count 18)**

Defendant Malik knowingly and voluntarily joined with Dr. Sherlekar, Vic Wadhwa, Muhammad Khan, and Carlyle Fraser in a conspiracy to defraud the United States of tax revenues due and owing by obstructing, impairing, impeding and defeating the lawful functions of the IRS. This conspiracy commenced as early as 2009 and continued through the end of 2013. Defendant Malik and his co-conspirators undertook

a number of different actions to accomplish their objectives of under-reporting their income and thereby unlawfully reducing their taxes owed.

First, Drs. Malik and Sherlekar were aware that the cash collected at the various APMS/ASC offices for co-pays and cash payments by patients who lacked health insurance was logged in to the NextGen system (a software program used by medical practices to calculate and submit claims for reimbursement from insurers) by the front desk personnel at each of APMS/ASC's offices, but it was not entered into the QuickBooks accounting system, which was the source of the records that the practice's accountant used in preparing its tax returns. The amount of the cash payments taken in by APMS/ASC's individual offices was always substantial, and it grew significantly over time as the practice's patient volume increased. The cash logs recording these payments survive starting in May 2011, and for the last seven months of 2011, they reflect that the total amount of cash collected by the practice was $426,363.91. The cash logs cover the entire calendar year of 2012, and they reflect that a total of $726,130.03 was collected over the course of that year, with $530,437.52 coming in the period January through August 2012, before Khan and Wadhwa left the practice. Yet the practice's bank account records for May 2011 through August 2012 reflect very few cash deposits.

Beginning sometime prior to January 2010, Drs. Malik and Sherlekar directed first Khan and later Wadhwa to take custody of the cash collected by the front desk personnel at each APMS/ASC office, but then to hold the cash, rather than depositing it into one of APMS/ASC's bank accounts. Khan and Wadhwa then divided up the cash into roughly equal amounts and distributed it to Drs. Malik and Sherlekar, while also retaining a certain amount to meet the practice's cash needs. As time passed, Khan and Wadhwa began setting aside significant amounts of cash for themselves as well.

As early as January 7, 2010, for example, which was little more than a month after Wadhwa started working for APMS/ASC, Wadhwa and Dr. Malik had an exchange by means of Google Chat where Wadhwa informed Dr. Malik that "I just got done counting the cash," a process that Wadhwa said had taken him over an hour. Wadhwa further explained that the "distribution will be 12k monthly 6k to [yo]u 6k [to] ss [Sherlekar], and that "I have ure package ready." Wadhwa also said that he would "hold on to lil [*sic*] cash for [the] office is 6k ok". GX 32(a). In May 2010, Wadhwa advised Khan that he had decided to get a safe deposit box at a Wachovia Bank branch in New Jersey "for co pay too much cash don[']t want to keep it in office safe I was counting till 2 in the night." Similarly, in May 2011, Dr. Malik asked Wadhwa – who was planning on leaving soon on a trip to India – "before you take off to india, is there going to be a cash distribution again?" GX 32(d); see also GX 32(e) (Wadhwa advises Khan that "I will see him [Malik] at 4 to give him cash"). And in an email between Wadhwa and Dr. Malik in December 2011, Wadhwa reported that he soon planned to make a cash distribution for the month of December of "6 for u / 6 for ss," while still keeping $20,000 in cash as a reserve. GX 14(c). And on August 29, 2012, as Dr. Malik was approaching the date of a real estate closing, he sent a text message to Khan asking, "Can you have vic deposit my cash I need it to be ready for my closing." GX 32(h).

Sometimes, the doctors instructed Wadhwa to purchase items for them using the money set aside for their cash distributions. For example, in early August 2010, Wadhwa used a portion of Dr. Sherlekar's cash receipts to purchase a Rolex watch at his request. One month later, on September 7, 2010, Wadhwa reported to Dr. Sherlekar that "I have ure distribution of 6k I was wondering if I can pick up 3-4 gold coins for you instead Unless u need cash," to which Sherlekar replied, "Go ahead." GX 32(c). A

month after this transaction, on October 16, 2010, Dr. Malik used at least $13,000 in cash that had been held for him by Wadhwa to purchase an engagement ring for his fiancé and also to purchase a jeweled Milus watch from an itinerant New York jewelry salesman with the initials R.W. [Wadhwa and R.W. Grand Jury Testimony.]

According to records maintained by Wadhwa, each doctor received cash distributions of just under $116,000 in 2010; $140,000 in 2011; and $135,000 over the first eight months of 2012, before Wadhwa and Khan were effectively fired from their positions with the practice. [Wadhwa Grand Jury Testimony.]

Both Drs. Malik and Sherlekar also did not report on their tax returns, or did not pay taxes on, the payments they received from Monaco Consulting and later Efficient Management as a result of APMS/ASC's referrals-for-kickbacks agreement with Accu Reference. In the case of Dr. Malik, he received approximately $84,880 from this source during the last six months of 2011 and $157,096 during the first eight months of 2012, for a combined total of $241,976. Dr. Sherlekar received a very similar amount.

In addition, beginning in late 2011, the doctors caused 10% of the revenues received by APMS/ASC to be paid over to Efficient, ostensibly as a "management fee." (These funds were separate from the ongoing Accu Reference kickback payments funneled through Munich Management to Efficient.) On his 2012 tax return, Dr. Malik did not report two transfers totaling almost $77,000 that were made on June 1, 2012 from Efficient's account using these APMS/ASC-derived funds – one for $40,000 (check # 3026) that was made payable to Dr. Malik's girlfriend, and which was used by her to make the down payment on a 25-acre farm, and a second for $36,580.32 (check # 3027) to Dr. Malik himself that was labeled as a "Rebate."

But the most financially significant means by which Drs. Sherlekar and Malik defrauded the United States of tax payments that it was due involved their use of Carlyle Fraser, an accountant in Newark, New Jersey, to prepare fraudulent tax returns for APMS/ASC and their other related entities. Fraser, a former IRS Revenue Agent, was originally retained by Dr. Malik to prepare his personal returns. Starting in 2009, he began preparing the practice's tax returns and Dr. Sherlekar's tax returns as well. Although the doctors' combined practice was growing rapidly and generating more and more income between 2009-2011, Dr. Malik's taxable income shrank dramatically during this same period after Fraser took over the preparation of the tax returns for both the various APMS/ASC-related corporate entities and for Dr. Malik personally:

| **Year** | **2008** | **2009** | **2010** | **2011** | **2012** | **2013** |
|---|---|---|---|---|---|---|
| Net Income Reported on Schedules K-1 | $86,275 | $842,124 | $489,190 | $556,683 | $1,548,838 | $2,505,798 |
| Reported Adjusted Gross Income (AGI) | $85,967 | $784,399 | $424,258 | $552,761 | $1,487,098 | $2,275,443 |
| Total Tax Reported as Due & Owing | $10,398 | $247,213 | $123,942 | $147,102 | $473,189 | $842,192 |
| Tax Return Preparer | Carlyle Fraser | Carlyle Fraser | Carlyle Fraser | Carlyle Fraser | Personal & two corporate returns: Fraser; other corporate returns: Mr. R.R. | Mr. R.D. |

The practice's income also continued to grow throughout 2012, but during that year, (1) the doctors learned by February 2012 that their practice was the subject of a civil HHS-OIG investigation for fraudulently billing anesthesia procedures; (2) the two doctors had a falling out with Khan and Wadhwa, who were effectively terminated in late August 2012; and (3) the doctors caused a civil lawsuit to be filed on behalf of the practice in U.S. District Court in December 2012 in which they accused Khan and Wadhwa of setting up the referrals-for-kickbacks arrangement with Accu Reference and of stealing all the unreported cash payments without their knowledge. When the 2012 corporate returns came to be prepared in 2013, the doctors turned to a new accounting firm to handle most of the corporate returns, and Fraser reduced the amount of his fraudulent adjustments on the two corporate returns he did prepare.

The primary method that Fraser used to fraudulently reduce the earnings of APMS/ASC and the related corporate entities owned by Drs. Malik and Sherlekar was to overstate the entity's reported figures for Cost of Goods Sold (CGS). Fraser did this by simply making up numbers or by adding fictitious expense categories that were never actually incurred. For tax year 2009, for example, Fraser boosted APMS/ASC's CGS figure from $756,092.00, the number shown on the practice's profit and loss statements generated by QuickBooks, to $1,254,241 – an increase of just under half a million dollars. He also added in a made-up item for "Outside Services" in the amount of $275,500.00, for total fraudulent expenses of $773,649. When divided by two to reflect Dr. Malik's 50% ownership interest in APMS/ASC, this reduced Dr. Malik's taxable income from APMS/ASC for 2009 by $386,824.50. Fraser similarly invented additional fraudulent expenses totaling $185,567.36 for three other APMS/ASC-related entities in 2009: Advanced Anesthesiology Associates (AAA) ($110,554.36); Advanced Pain

Surgery Center, LLC (APSC) ($36,019); and American Spine Center (ASC) ($38,994). Again, after being divided by 50% to reflect Dr. Malik's ownership interests in these three entities, these fraudulent expenses served to reduce his income by an additional $92,783.68. Finally, Fraser created fraudulent expenses to reduce the income of two other purely Malik-owned entities – his professional corporation Atif B. Malik, M.D., P.C. and Advanced Pain & Spine Center, LLC – by $29,894 and $373,386 respectively. All of these fraudulent adjustments by Fraser together served to reduce Dr. Malik's reported income in 2009 by $864,218.88. This allowed Dr. Malik to evade $305,504 in federal taxes that year, in addition to additional savings that resulted from failing to report the practice's cash proceeds – a number that cannot be determined for 2009 because the cash logs from the practice's individual offices for that year have not survived.

Fraser employed similar methods to understate Dr. Malik's income in the following years. For tax year 2010, he fraudulently boosted APMS/ASC's expenses by inflating the CGS number by $423,642 (for "subcontractors" and "purchases") and adding another $64,964 for "equipment rent" and "expenses," for a combined total of $488,606 in fraudulent costs. He similarly reduced the earnings of AAA from $664,501 to $56,144 by adding false expenses in more than two dozen different categories, thus reducing its revenues by $608,357. He followed similar practices with APSC (reducing its revenues by $27,729) and ASC (reducing its revenues by $183,503), thereby reducing the net revenue of these four jointly-owned entities by a combined $1,308,195 and Dr. Malik's income by $654,097.50. For the two solely Malik-owned entities Atif B. Malik, M.D., P.C. and Advanced Pain & Spine Center, LLC, Fraser fraudulently reduced their revenues by $40,264 and $134,279 respectively, for an additional $174,543. All told,

these fraudulent adjustments resulted in a total reduction of Dr. Malik's taxable income in 2010 of $828,640.50, thereby allowing Dr. Malik to evade $352,466 in federal taxes for that year.

Similar fraudulent techniques were employed by Fraser to reduce Dr. Malik's reported taxable income for 2011 by $602,216 (in addition to the unreported funds totaling $84,880 from the Accu Reference kickbacks and the unrecorded cash payment distributions of $140,000), and to reduce his reported taxable income for 2012 by $538,988.76 (again, in addition to $210,282.34 in unreported kickback proceeds and APMS profit distributions, plus $135,000 in unrecorded cash payment distributions). One new technique Fraser used on the two 2012 corporate tax returns that he prepared for APSC and ASSC was adding the identical dollar amount ($211,020) as an expense for "Employee benefit programs" on both returns, even though neither entity actually had any employees. As a result of these fraudulent adjustments by Fraser, Dr. Malik's tax liability for 2011 was fraudulently reduced by $227,280 and for 2012 by $272,462.

In all, for the period 2009-2012, with Fraser's assistance, Dr. Malik fraudulently underreported his taxable income by $3,374,997.55, and he owes an additional $1,157,712 in federal income taxes for these four years. Dr. Sherlekar owes an additional $1,029,661 based upon similar fraudulent practices, making the combined tax loss from the doctors' and their confederates' conspiracy to defraud the United States $2,187,373. In addition, for both the 2011 and the 2012 tax years, Dr. Malik failed to report more than $10,000 in income derived from criminal activity: the referrals-for-kickbacks arrangement between APMS/ASC and Accu Reference. For further detail on the tax loss calculations, see the two tables attached as Exhibits 1 and 2, which are incorporated into this Statement of Facts by reference.

**EXHIBIT 2**
**SCHEDULE OF SPECIFIC ITEM AND STATUTORY INCOME TAX ADJUSTMENTS – SANDEEP SHERLEKAR**

| YEAR | 2009 | 2010 | 2011 | 2012 | TOTALS |
|---|---|---|---|---|---|
| Unreported Income | | | $101,880 (kickbacks) | $210,282.34 (kickbacks plus APMS revenues transferred to Efficient) | |
| Schedule E - S Corporation Income | $479,617 | $886,080 | $689,842 | $538,989 | |
| Itemized Deductions (AGI Phase-outs) | $4,796 | $0 | $0 | $0 | |
| Self-Employed AGI Adjustment (Salutatory Adjustment) | $0 | $0 | $0 | ($5,412) | |
| Taxable Income Per Return | $712,724 | $419,378 | $249,470 | $1,234,678 | |
| **Corrected Taxable Income** | **$1,197,137** (+484,413) | **$1,305,458** (+886,080) | **$1,041,192** (+791,722) | **$1,978,537** (+743,859) | (+2,906,074) |
| Tax Owed | $396,681 | $434,554 | $341,731 | $667,059 | |
| Less: Residential Energy Credit | ($1,500) | $0 | $0 | $0 | |
| Less: General Business Credit | $0 | $0 | $0 | $0 | |
| Self-Employment Tax | $24,846 | $23,095 | $13,950 | $36,894 | |
| Total Corrected Tax Liability | $420,027 | $457,649 | $355,681 | $703,953 | |
| Total Tax Shown on Return | $248,773 | $147,521 | $83,933 | $427,422 | |
| **Difference: Additional Federal Income Tax Due and Owing** | **$171,254** | **$310,128** | **$271,748** | **$276,531** | **$1,029,661** |

**EXHIBIT 1**
**SCHEDULE OF SPECIFIC ITEM AND STATUTORY INCOME TAX ADJUSTMENTS – ATIF MALIK**

| YEAR | 2009 | 2010 | 2011 | 2012 | TOTALS |
|---|---|---|---|---|---|
| Unreported Income | | | $84,880 (kickbacks) | $222,143.43 (kickbacks plus APMS revenues transferred to Efficient) | |
| Schedule E - S Corporation Income | $864,219 | $1,053,909 | $602,216 | $538,989 | |
| Itemized Deductions (AGI Phase-outs) | $8,642 | $0 | $0 | $0 | |
| Self-Employed AGI Adjustment | $0 | $0 | $0 | $0 | |
| Taxable Income Per Return | $712,717 | $317,574 | $535,940 | $1,358,322 | |
| **Corrected Taxable Income** | **$1,585,578** (+872,861) | **$1,371,483** (+1,053,909) | **$1,223,036** (+687,096) | **$2,119,454** (+761,132) | (+3,374,998) |
| Tax Owed | $5532,636 | $450,327 | $397,934 | $710,948 | |
| Less: Residential Energy Credit | ($1,500) | $0 | $0 | $0 | |
| Less: Prior Year Minimum Tax Credit | ($1,607) | $0 | $0 | $0 | |
| Self-Employment Tax | $23,188 | $26,081 | $15,802 | $34,703 | |
| Total Corrected Tax Liability | $552,717 | $476,408 | $413,736 | $745,651 | |
| Total Tax Shown on Return | $247,213 | $123,942 | $186,456 | $473,189 | |
| **Difference: Additional Federal Income Tax Due and Owing** | **$305,504** | **$352,466** | **$227,280** | **$272,462** | **$1,157,712** |

I have read the foregoing statement of facts with my attorney, understand it, agree with it, and do not wish to change any part of it. I further understand that it is included as part of my plea agreement with the government in this case.

Stipulated and Agreed to this 25th day of June, 2018:

ATIF BABAR MALIK, M.D.

# APPENDIX A3

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

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA** | ) | |
| | ) | |
| **v.** | ) | **CASE NO. 18-4688** |
| | ) | |
| **ATIF BABAR MALIK,** | ) | |
| | ) | |
| ***Defendant-Appellant.*** | ) | |
| | ) | |

**THE UNITED STATES OF AMERICA'S MOTION**
**TO STAY THE BRIEFING SCHEDULE IN THIS CASE,**
**ENFORCE THE APPELLATE WAIVER, AND DISMISS THIS APPEAL**

The United States of America moves to dismiss defendant Atif Babar Malik's appeal, which his counsel has advised us will contend that the three Travel Act counts on which he was convicted at trial fail to state an offense. (The defendant does not intend to challenge the other 22 counts on which he was convicted at trial, and one other count to which he pled guilty.) However, the defendant waived his right to appeal all of his convictions in a plea agreement he concluded with the government between his trial and sentencing. While his counsel will contend that defendant Malik's attack upon the Travel Act counts can proceed because it is "jurisdictional" in nature or alternatively because he is "actually innocent" of those charges, neither contention has merit, for the reasons set forth below.

## STATEMENT OF THE CASE

The original indictment in this case charged defendant Malik (a physician who was the co-owner of a chain of pain management clinics) and several other defendants with conspiracy and with substantive violations of the federal health insurance Anti-Kickback Act (18 U.S.C. § 371 and 42 U.S.C. §1320a-7b(b)1(A) & (b)(2)(A)); with a *Klein* conspiracy charge of defrauding the United States arising out of a scheme to evade federal income taxes on millions of dollars of income (18 U.S.C. § 371); with making false statements in medical records (18 U.S.C. § 1035); and with health care fraud (18 U.S.C. § 1349). In July 2017, the government obtained a superseding indictment that added four additional charges of violating the Travel Act (18 U.S.C. § 1952), which also related to the defendants' scheme to solicit and receive hundreds of thousands of dollars of unlawful kickbacks from a New Jersey laboratory testing company known as Accu Reference.

Defendant Malik's then-counsel filed pre-trial motions challenging all of the charges against him. One motion sought dismissal of the Travel Act counts on the ground that New Jersey's commercial bribery statute (N.J. Stat. Ann. § 2C:21-10), the underlying state offense, did not apply to Dr. Malik because he ordered the tests in question from his practice's offices in Maryland, even though he was also

licensed in, and maintained an office in, New Jersey; the test requests were transmitted from Maryland to a New Jersey testing lab; the tests ordered were conducted in New Jersey; the kickback checks were issued in New Jersey; and the Chief Financial Officer (CFO) of the defendant's medical practice regularly traveled between Maryland and New Jersey to review the amount of kickbacks owed with the lab testing company's president, to collect the kickback checks, and to deposit these checks at banks located in Maryland. *United States v. Malik*, Crim. No. MJG-16-0324, ECF # 162.

The trial court severed the *Klein* conspiracy count (Count 18) for a separate trial, but otherwise denied all of the defense's substantive attacks upon the remaining charges, including those relating to the Travel Act. Defendant Malik went to trial on the remaining 26 counts of the superseding indictment on October 11, 2017. During the trial, the government dismissed one of the Travel Act counts (Count 15) after determining that it did not involve an interstate wiring. On October 27, the defendant was convicted on all of the remaining 25 counts of the indictment, including three Travel Act offenses. ECF # 272.

Following the defendant's convictions at trial, his then-counsel filed post-trial motions seeking judgments of acquittal or a new trial as to all of the counts on which he was convicted. On June 19, 2018, the district court denied the

defendant's post-trial motions, including his renewed attack on the three Travel Act counts. ECF # 370. Just under one week later, on June 25th, the defendant entered a guilty plea to the *Klein* conspiracy count (Count 18). The portions of his plea agreement that are pertinent to this motion are attached as **Exhibit 1.**

Under his plea agreement, the defendant agreed to waive his right to file an appeal challenging his convictions or sentence not only with regard to Count 18, but also as to all of the 25 counts of which he was convicted at trial:

> 16. In exchange for the concessions made by this Office and the Defendant in this plea agreement, this Office and the Defendant waive their rights to appeal as follows:
>
> a. The Defendant knowingly waives all right, pursuant to 28 U.S.C. § 1291 or otherwise, to appeal the Defendant's conviction as to Count Eighteen or any of the counts on which he was convicted at trial (Counts One through Fourteen, Sixteen through Seventeen, and Nineteen through Twenty-Seven) *on any ground whatsoever*. This includes a waiver of all right to appeal the Defendant's conviction on the ground that the statute to which the Defendant is pleading guilty is unconstitutional, or *on the ground that the admitted conduct does not fall within the scope of the statute.*

(Emphasis added.)

At defendant Malik's rearraignment, the district court engaged him in an extensive colloquy to ascertain whether his guilty plea (in all its aspects) was knowing and voluntary. **Exhibit 2 (selected portions of the rearraignment transcript).** The defendant affirmed that his mental alertness was not affected by

the use of drugs or alcohol (page 7), that he had been given a fair opportunity to discuss the case with his attorneys, and that he was satisfied with the representation he had received (pages 7-8). The court further explained to the defendant that:

> If you are convicted at a trial, there's a right to an appeal. The appeal would go to the Court of Appeals, they'd review the case. They could say you're not guilty. They could say you deserve a new trial, but they could affirm. You understand you'd be giving up all those rights by pleading guilty?
>
> THE DEFENDANT: Yes, your Honor.
>
> THE COURT: That's what you wish to do?
>
> THE DEFENDANT: Yes, your Honor.

*Id.* at 10 **(Exhibit 2)**.

The court then asked government counsel to summarize the terms of the plea agreement. *Id.* at 10-14. Near the end of his recitation, government counsel expressly noted that the defendant had agreed to waive his appellate rights:

> In addition, the defendant has agreed to waive appeal as to the merits of all of the counts [o]n which he was previously convicted at trial and to bring no challenge on appeal on any grounds as to the other trial convictions and also has agreed to waive any challenge to the decision this Court reaches as to sentencing on all of these convictions. I believe that fully states the terms of the plea agreement.

*Id.* at 14. After the Court asked defense counsel whether he agreed with government counsel's summary of the plea agreement's terms (which he did), the Court then checked with the defendant one final time:

> THE COURT: Dr. Malik, do you understand the plea agreement?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. Do you think anybody has made a promise to you about this case except what is in the plea agreement?
>
> THE DEFENDANT: No, sir.

*Id.* at 14-15.

The defendant's case subsequently came before the district court for sentencing on September 11th. Defense counsel contended that although defendant Malik had contested his guilt as to 25 counts in a three-week trial, he should nevertheless receive a reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1 because "the plea to the tax count with the appellate waiver in terms of the procedural component of the case suggests that some acceptance should be given here." **Exhibit 3 (Sentencing Transcript)** at 46-47. Defense counsel came back to this point at page 50 of the transcript ("Most importantly I do think is the fact that he ultimately pled guilty to the tax count *and accepted responsibility in there for the other conduct*, that weighs in favor of the adjustment.") (emphasis added). And the sentencing court showed some receptiveness to this argument, stating to government counsel:

> THE COURT: Mr. Gray, the defendant ultimately pled guilty to the tax count. He ultimately entered into a disposition that largely wound up an otherwise very complex, messy picture and situation. . . .

> [G]oing back to the point in the process where the defendant ultimately pleads to the tax count and signs the agreement that he does, *including the appeal waiver*, he didn't do [*sic*; probably should read "didn't he do"] something that truncated the process and saved the government resources and burdens down the road, the sorts of things that the acceptance of responsibility guideline is pretty nakedly about?

*Id.* at 51 (emphasis added). In response, government counsel conceded that in addition to sparing the government the trial of the tax charge, "There would have been the potential for an appeal on the trial conviction counts . . . . [T]here is still some amount of work that has been saved for the government, without question. That's the reason why in our reply brief I think I indicated that I could see that you could give him, say, a six-month reduction based upon that." *Id.* at 52-53. In the end, the court did give the defendant a one level reduction for acceptance of responsibility. *Id.* at 55.

The court sentenced defendant Malik to a term of 96 months imprisonment, a three year term of supervised release, restitution of $1.332 million, a forfeiture of $241,976, a fine of $75,000.00, and a special assessment of $2,600. ECF # 423. On September 23, 2018, his counsel filed a Notice of Appeal on his behalf (as defense counsel are required to do if their client requests it), and on October 18th, moved to withdraw from further representing him. On December 6th, that motion was granted, and the Maryland Office of the Federal Public Defender (OFPD) was

appointed to represent defendant Malik on this appeal. Appeal No. 18-4688, ECF #s 5 & 9.

## ARGUMENT

### I. THE APPELLATE WAIVER AGREED TO BY APPELLANT IN THIS CASE IS VALID AND ENFORCEABLE, AND APPELLANT'S INTENDED CLAIMS ARE WITHIN THE SCOPE OF THE WAIVER

This Court first recognized nearly thirty years ago that appellate waivers are a permissible and legitimate component of plea bargaining. *United States v. Wiggins*, 905 F.2d 51, 53-54 (4th Cir. 1990). Where, as here, the United States has fully adhered to its part of the plea bargain, allowing a defendant to raise issues on appeal notwithstanding his agreement to waive his appellate rights "would unfairly deny the United States an important benefit of its bargain." *United States v. Blick*, 408 F.3d 162, 173 (4th Cir. 2005); *see also, e.g., United States v. Teeter*, 257 F.3d 14, 22 n.4 (1st Cir. 2001) (stressing the importance of protecting the government "against bait-and-switch tactics on the part of a defendant who makes concessions to the government and then seeks to keep what she got and withdraw what she gave"). This Court will therefore enforce an appeal waiver and dismiss the defendant's appeal if the record establishes (1) that the waiver is valid and (2) that the issue being appealed is within its scope. *Blick*, 408 F.3d at 168; *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992).

A waiver is valid if the defendant knowingly and intelligently agreed to waive the right to an appeal. *Blick*, 408 F.3d at 169; *United States v. Attar*, 38 F.3d 727, 731-33 (4th Cir. 1994). While that determination can often be made based purely on the plea colloquy – especially if the district court questioned the defendant to ensure that he understood the meaning and consequences of the appeal waiver – this question may also be "evaluated by reference to the totality of the circumstances." *United States v. General*, 278 F.3d 389, 400 (4th Cir. 2002). These include the facts surrounding the case, and the background, experience, and conduct of the defendant. *Blick*, 408 F.3d at 169, *citing United States v. Davis*, 954 F.2d 182, 186 (4th Cir. 1992); *General*, 278 F.3d at 400.

There is no colorable basis here for disputing that defendant Malik knowingly and voluntarily agreed to the appeal waiver. A veteran United States District Court judge (the Hon. Marvin J. Garbis) carefully took him through the rearraignment colloquy under FED. R. CRIM. P. 11, 6/25/18 Transcript ("Tr.") (**Exhibit 2**), during which, *inter alia*, he affirmed that he was satisfied with his attorneys' representation, *id.* at 8, and acknowledged that he understood he was giving up his right to an appeal. *Id.* at 9-10. **Exhibit 2.**

Looking beyond the plea colloquy itself to the totality of the circumstances (*Blick*, 408 F.3d at 169; *General*, 278 F.3d at 400), the defendant was 48 years old

at the time he agreed to his plea; he had a college education and a medical degree; and he had been a practicing physician and the 50% owner of a substantial pain management practice that at its height operated 11 offices in Maryland and New Jersey. Moreover, the government's on-again, off-again discussions with the defendant concerning a possible guilty plea were prolonged and extensive, involving several different sets of defense attorneys. Sentencing Tr. at 58 (**Exhibit 3**) (Government counsel notes that there were "four separate iterations of the tax plea stretching over a year and a half").

The next issue is whether the appellant's intended attack upon the Travel Act counts is within the scope of his appellate waiver. Again, there can be no question that it is. The plea waiver in this case, much like that which was before this Court in *Blick*, 408 F.3d at 169, was expansive, barring the defendant from appealing "on any ground whatsoever." **Exhibit 1,** ¶ 16(a). Beyond that, the scope of the appeal waiver expressly encompassed claims that the defendant's "conduct does not fall within the scope of the statute." *Id.*

This Court has recognized several narrow and limited circumstances in which an otherwise valid appellate waiver will not be enforced. These are: where proceedings following the entry of the defendant's guilty plea were conducted in violation of his or her right to counsel; where the defendant's sentence exceeded

the applicable statutory maximum; where his or her sentence was based upon an impermissible factor such as race; or where enforcement of the appeal waiver would result in a miscarriage of justice. *United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005); *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000).[1]

The government is confident that there will be no contention by appellant that any of the first three circumstances above were present here. Nor did the defendant's conviction on the three Travel Act counts constitute a "miscarriage of justice." Defendant's counsel energetically litigated this issue by motion both before and after trial. ECF #s 162, 213, and 370. At trial, the defense renewed its objections to these counts at the close of the government's case and then expended substantial effort shaping the language of the relevant jury instructions: indeed, defense counsel did not subsequently challenge any aspect of the court's instructions on the Travel Act counts following the verdict. Defendant Malik was therefore afforded a full and fair opportunity to litigate his challenge to the three Travel Act counts before the district court.

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[1] The Supreme Court has also established that there is a very limited additional class of non-waivable claims that implicate "the right not to be haled into court at all." *Blackledge v. Perry*, 417 U.S. 21, 30-31 (1974). These include assertions that a charging decision resulted from prosecutorial vindictiveness, *id.*, as well as double jeopardy claims under some circumstances. *United States v. Broce*, 488 U.S. 563, 575 (1989); *Menna v. New York*, 423 U.S. 61, 63 n.2 (1975).

Thus, none of the exceptions that this Court has identified as providing a justification for withholding enforcement of an otherwise valid appellate waiver are present here. We now turn to appellant's counsel's claim that their attack upon the Travel Act counts is "jurisdictional" in character, and therefore not subject to waiver. As the next section demonstrates, that assertion is wholly lacking in merit.

## II. A CLAIM THAT A CRIMINAL CHARGE FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, OR IS OTHERWISE OUTSIDE THE SCOPE OF THE REFERENCED STATUTE, DOES NOT IMPLICATE THE COURT'S SUBJECT MATTER JURISDICTION, AND MAY THEREFORE BE WAIVED BY A DEFENDANT

Because the absence of subject matter jurisdiction means that the district court never had the power to hear or consider the case, jurisdictional claims can never be forfeited, whether by a guilty plea, an appeal waiver, or simple neglect. But a challenge to a criminal charge or a civil claim based on the assertion that it alleges facts that are insufficient to state an offense or a meritorious cause of action is not jurisdictional in character. That proposition is solidly established by Supreme Court and circuit court precedent stretching back over a century.

The wellspring of federal criminal subject matter jurisdiction is 18 U.S.C. § 3231, which provides that the district courts "shall have original jurisdiction . . . of

all offenses against the laws of the United States." And "[s]ubject matter jurisdiction, or the 'court's power to hear a case,' is straightforward in the criminal context." *United States v. Scruggs*, 714 F.3d 258, 262 (5th Cir. 2013). To establish federal criminal jurisdiction, all that is required is that the indictment charge a defendant with an offense against the United States in language similar to that used by the relevant statute. *Id.*; *see also United States v. Frias*, 521 F.3d 229, 235-36 (2d Cir. 2008) ("The indictment plainly tracks the language of the statute and states the time and place of the alleged murder. It was therefore sufficient to invoke the district court's jurisdiction and to state an offense."); *United States v. Gonzalez*, 311 F.3d 440, 442 (1st Cir. 2002) ("a case is within the subject matter jurisdiction of the district court if the indictment charges . . . that the defendant committed a crime described in Title 18 or in one of the other statutes defining federal crimes"); *Hugi v. United States*, 164 F.3d 378, 380 (7th Cir. 1999) (Easterbrook, J.) ("Subject-matter jurisdiction in every federal criminal prosecution comes from 18 U.S.C. § 3231 . . . . That's the beginning and the end of the 'jurisdictional' inquiry."). Whether a given criminal charge ultimately proves to be well-founded is of no moment from the standpoint of determining whether a district court has authority to adjudicate proceedings related to it.

This principle was first established by the Supreme Court more than a century ago, in *Lamar v. United States*, 240 U.S. 60 (1916). In *Lamar*, a defendant successfully contended before the district court that an indictment charging him with a fraudulent scheme fell outside the court's subject matter jurisdiction because it did not charge a federal criminal offense. In a unanimous decision authored by Justice Holmes, the Supreme Court easily swept aside his claim and reversed, holding that:

> [N]othing can be clearer than that the district court, which had jurisdiction of all crimes cognizable under the authority of the United States [citation omitted], acts equally within its jurisdiction whether it decides a man to be guilty or innocent under the criminal law, and whether its decision is right or wrong. *The objection that the indictment does not charge a crime against the United States goes only to the merits of the case.*

*Id.* at 65 (emphasis added).

The Court subsequently reaffirmed this view of the district courts' criminal subject matter jurisdiction in *United States v. Williams*, 341 U.S. 58 (1951). The issue in *Williams* was whether a defendant could be charged with perjury based upon his testimony in a conspiracy trial where the indictment was afterwards held invalid on appeal. The district court in the follow-on perjury case dismissed the indictment because it believed the result on appeal in the original case meant that the district court there lacked jurisdiction. The Supreme Court squarely rejected

that view, holding that it was sufficient for jurisdictional purposes that the original conspiracy charge had alleged a violation of a federal criminal statute:

> Hence, it had jurisdiction of the subject matter, to wit, an alleged violation of a federal conspiracy statute, and, of course, of the persons charged. This made the trial take place before 'a competent tribunal': a court authorized to render judgment on the indictment. The circumstance that it ultimately determined on appeal that the indictment was defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment.
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> . . .
>
> Where a federal court has power, as here, to proceed to a determination on the merits, that is jurisdiction of the proceedings. The District Court has such jurisdiction. Though the trial court or an appellate court may conclude that the statute is wholly unconstitutional, *or that the facts stated in the indictment do not constitute a crime* or are not proven, it has proceeded with jurisdiction[.]

*Id.* at 66, 68-69 (emphasis added). *See also United States v. Sardelli*, 813 F.2d 654, 656 (5th Cir. 1987) (stating "that Sardelli's conviction was vacated does not mean that the district court was without jurisdiction to try him" on a perjury charge arising out of the earlier proceeding).

More recently, the Court reaffirmed the continuing validity of both *Lamar* and *Williams* in *United States v. Cotton*, 535 U.S. 625 (2002). In *Cotton*, the Supreme Court unanimously reversed a decision by this Court holding that an indictment's omission of a key element of an offense was a jurisdictional defect that required vacating the appellants' sentences. The Court emphasized that

subject matter jurisdiction involves only the narrow question of whether a court has the statutory or constitutional power to adjudicate the case at all. *Id.* at 630, *citing Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). Relying upon both *Lamar* and *Williams*, the Court in *Cotton* re-emphasized that "defects in an indictment do not deprive a court of its power to adjudicate a case." *Id.* at 630-31.[2]

Since the Supreme Court decided *Cotton*, at least five of the federal Circuit Courts of Appeal – the First, Second, Fifth, Sixth, and Tenth circuits – have followed its holding and affirmed that a claim that a criminal charge fails to state an offense does not affect the district court's subject matter jurisdiction over that count.[3] Thus, in *United States v. Rubin*, 743 F.3d 31 (2d Cir. 2014), the Second

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[2] Similarly, in the context of civil proceedings, the Supreme Court has stressed that:

> Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not a dismissal for want of jurisdiction.

*Bell v. Hood*, 327 U.S. 678, 682 (1946).

[3] In the Seventh Circuit, that proposition was already clearly established by pre-*Cotton* precedent. *See Hugi v. United States*, 164 F.3d 378, 380 (7th Cir. 1999). And in *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004), Judge David Sentelle stated his view that "The power to declare that law [under § 3231]

Circuit rejected a defendant's contention that, despite his guilty plea, he could challenge the legal sufficiency of a charge on appeal because his claim was jurisdictional in nature. In *Rubin*, the defendant asserted that he was convicted of a "non-offense" when the Court accepted his guilty plea to a charge of conspiring to operate an unlawful betting or wagering business over the internet (18 U.S.C. § 371 & 31 U.S.C. § 5363). Rubin asserted that his conduct did not fall within the scope of the statute because it was merely that of a "financial transaction provider," which was expressly excluded from the statutory definition of "business of betting or wagering." *Id.* at 35. But the Second Circuit rejected his contention in light of *Cotton*, *Lamar*, and *Williams*, which it noted together "confirm that challenges to an indictment on the basis that the alleged conduct does not constitute an offense under the charged statute are also non-jurisdictional challenges." *Id.* at 37. The Court concluded:

> In order to invoke a district court's jurisdiction, an indictment need only allege that a defendant committed a federal criminal offense at a stated time and place in terms plainly tracing the language of the relevant statute. . . . When such jurisdiction is established, a district court has authority to decide all other issues presented within the framework of the case . . . .

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includes the power to decide whether the offense charged is a true offense . . . . [T]he substantive sufficiency of the indictment is a question that goes to the merits of the case, rather than the district court's subject-matter jurisdiction." *Id.* at 1342.

> In this case, Count One of the Indictment invoked the District Court's jurisdiction by charging Rubin with an offense against the United States – conspiring to violate the UIGEA [] – at a specified time and place and in terms tracking the language of the relevant statutes. Whether Rubin's alleged conduct amounted to nothing more than the "activities of a financial transaction provider" concerns the merits of the case, not the district court's jurisdiction over the action.

*Id.* at 39 (statutory provisions omitted).

Like the Second Circuit in *Rubin*, the Tenth Circuit rejected a defendant's contention that *Cotton*'s holding was limited to omissions from an indictment in *United States v. De Vaughan*, 694 F.3d 1141 (10th Cir. 2012). The *De Vaughan* court found that *Cotton*'s reference to "defective indictment[s]" also "encompass[ed] indictments that fail to charge an offense." *Id.* at 1148. It accordingly held that a defendant's claim that the indictment failed to charge him or her with "a crime against the United States" (*Lamar*, 240 U.S. at 65) was not a jurisdictional claim and was fully capable of being waived. *Id.* at 1149. *See also United States v. Scruggs*, 714 F.3d 258, 264 (5th Cir. 2013) (following *De Vaughan* in holding that *Cotton* "unambiguously declared that a defective indictment does not deprive a district court of subject matter jurisdiction").

In *United States v. George*, 676 F.3d 249 (1st Cir. 2012), the First Circuit likewise followed *Cotton* in holding that

> if an indictment or information alleges the violation of a crime set out 'in Title 18 or in one of the other statutes defining federal crimes,' that is the end of the jurisdictional inquiry. . . . Supreme Court precedent makes transparently clear that an indictment's factual insufficiency does not deprive a federal court of subject matter jurisdiction.

*Id.* at 259. The First Circuit also took that position in *United States v. Gonzalez*, 311 F.3d 440 (1st Cir. 2002), where it noted that

> Conventionally, a case is within the subject matter jurisdiction of the district court if the indictment charges . . . that the defendant committed a crime described in Title 18 or in one of the other statutes defining federal crimes. In such a case subject matter jurisdiction, that is to say, authority to decide all other issues presented within the framework of the case, exists.

*Id.* at 442.

The Fifth Circuit reached the same conclusion in *United States v. Cothran*, 302 F.3d 279 (5th Cir. 2002), where the defendant sought to set aside his guilty plea and challenge the underlying indictment against him on the ground that "many counts of the indictment fail to state an offense against the United States." *Id.* at 282. The Fifth Circuit rejected his bid to reopen his case, pointing out that the Supreme Court's decision in *Cotton* "held that defects in the indictment are not jurisdictional," and accordingly found that "standard waiver principles apply to defects in the indictment." *Id.* at 283.

In *VanWinkle v. United States*, 645 F.3d 365 (6th Cir. 2011), the Sixth Circuit similarly rejected a defendant's claim that district court lacked jurisdiction

to accept his guilty plea on a charge of using unauthorized access devices because use of a fraudulent UPC label was not an access device, and his conduct therefore did not violate the charged criminal statute. Relying on *Cotton*, the Sixth Circuit held that his claim was instead "more properly considered as a legal sufficiency challenge," and found the indictment properly charged him with violations of federal criminal statutes that were all "cognizable federal offenses over which the district court had subject matter jurisdiction." *Id.* at 369.[4]

A succession of Supreme Court precedents in both criminal and civil cases stretching back over a century, as well as a long list of circuit court precedents both preceding and post-dating *Cotton,* therefore conclusively establish that a claim that a criminal charge failed to state a federal offense is not jurisdictional in nature, but rather calls for a determination on the merits that is well within a trial court's authority to adjudicate.

[4] Both before and after *Cotton*, state courts have held that a claim that an indictment charge was insufficient to state an offense is non-jurisdictional in character. *See, e.g.*, *Ex Parte Seymour*, 946 So.2d 536, 538-39 (Ala. 2006) (en banc) ("[t]he validity of Seymour's indictment is irrelevant to whether the circuit court had jurisdiction over the subject matter of this case"); *State v. Parkhurst*, 845 S.W.2d 31, 34-35 (Mo. 1992) ("Subject matter jurisdiction of the circuit court and the sufficiency of the information and indictment are two distinct concepts. The blending of these concepts serves only to confuse the issue to be determined.").

## III. THE ACTUAL INNOCENCE DOCTRINE IS NOT APPLICABLE HERE, AND LIKEWISE PROVIDES NO BASIS FOR ENABLING DEFENDANT MALIK TO ESCAPE HIS COMMITMENT TO WAIVE HIS APPELLATE RIGHTS

Any effort by defense counsel to rely upon the doctrine of actual innocence in an effort to resurrect defendant Malik's previously waived appellate rights should likewise prove unavailing. The "actual innocence" doctrine is normally applied in the habeas context, where a petitioner who has procedurally defaulted a claim by failing to raise it on direct review may do so if he or she can first demonstrate either cause and actual prejudice, or that he or she is actually innocent. *Bousley v. United States*, 523 U.S. 614, 622-23 (1998). To establish actual innocence, a petitioner must demonstrate that, absent the constitutional error of which he or she complains, in light of all the evidence, "it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. 623, *quoting Schlup v. Delo*, 513 U.S. 298, 327-328 (1995).

That highlights the major problem with any attempt to apply the doctrine of "actual innocence" here: the Travel Act charges in Malik's case *did* go to the jury, which was extensively instructed on the elements of these offenses (to the apparent satisfaction of defense counsel), and the twelve members of the jury unanimously convicted him on all three charges. And there has been no newly discovered

evidence or intervening legal developments since the time of the defendant's trial in late October 2017 that would now mandate a different result.

This case is therefore readily distinguishable from *United States v. Adams*, 814 F.3d 178 (4th Cir. 2016) and *Miller v. United States*, 735 F.3d 141 (4th Cir. 2013), two decisions the OFPD cited in support of its "actual innocence" argument in connection with a similar issue pending in *United States v. Kodi Johnson*, Appeal No. 18-4780 (ECF # 24). In both of those cases, the defendants were convicted of unlawful possession of a firearm under 18 U.S.C. § 922(g), based upon prior North Carolina state convictions that were considered felonies at the time. This Court's decision in *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc) subsequently established that their state offenses were not punishable by a maximum term of imprisonment exceeding one year, as required by § 922(g)(1) – meaning that the defendants in both *Miller* and *Simmons* were now actually innocent of the offenses to which they pled guilty. This Court vacated their convictions in each instance.

But the facts here bear no resemblance to those in either *Miller* or *Adams* (or those in *Bousley*, where the Supreme Court found that the petitioner had a reasonable chance of demonstrating on remand that he never "used" a firearm within the new understanding of that term established by *Bailey v. United States*,

516 U.S. 137, 144 (1995)). There has been no similar development here that has now cast the district court proceedings in an entirely new light.

Instead, defendant Malik simply wishes to relitigate the legal and factual issues relating to the Travel Act charges that the district court and the jury previously resolved against him. But it should not be permissible, whether as a contractual, legal, or ethical matter, for a defendant to agree to an appellate waiver; to allow his defense counsel to argue, and the district court to weigh, that waiver as a mitigating factor in determining whether an acceptance of responsibility reduction is appropriate at his sentencing; and then to cynically renege on that commitment immediately afterwards and pursue an appeal. Under these circumstances, to suggest that defendant Malik has been the victim of a miscarriage of justice turns the truth on its head.

## CONCLUSION

This Court should stay the briefing schedule; enforce defendant Malik's appellate waiver; and dismiss this appeal.

Respectfully submitted,

ROBERT K. HUR
UNITED STATES ATTORNEY

/s/

By: _____

Jefferson M. Gray
Assistant United States Attorney
U.S. Attorney's Office
36 S. Charles Street, 4th Floor
Baltimore, Maryland 21201
(410) 209-4915

Date: April 26, 2019

## EXHIBITS

| Exhibit No. | Description |
|---|---|
| 1 | Defendant's Plea Agreement (excerpts relating to the appellate waiver) |
| 2 | Pertinent excerpts from the defendant's guilty plea colloquy pursuant to FED. R. CRIM. P. 11 |
| 3 | Excerpts from the defendant's sentencing hearing that demonstrate his counsel's reliance upon his appeal waiver as a mitigating factor |

## CERTIFICATE OF COMPLIANCE

1. This motion has been prepared using:

   **Microsoft Word, Times New Roman, 14 Point typeface.**

2. EXCLUSIVE of the title of the motion, the list of exhibits, the statement with respect to oral argument, and the certificate of service, this motion contains **5,177** words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and/or a copy of the word or line print-out.

/s/

Jefferson M. Gray
Assistant United States Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of April 2019, a copy of the foregoing Government's Motion to Stay the Briefing Schedule in this Case, Enforce the Appellate Waiver, and Dismiss this appeal was served by means of the Court's CM/ECF system upon Ms. Joanna Silver, Assistant Federal Public Defender, Federal Public Defender's Office, 6411 Ivy Lane, Suite 710, Greenbelt, Maryland 20770.

/s/

Jefferson M. Gray
Assistant United States Attorney

# EXHIBIT ONE

**U.S. Department of Justice**

*United States Attorney*
*District of Maryland*

*Jefferson M. Gray*
*Assistant United States Attorney*
*Jefferson.M.Gray@usdoj.gov*

*Suite 400*
*36 S. Charles Street*
*Baltimore, MD 21201-3119*

*DIRECT: 410-209-4915*
*MAIN: 410-209-4800*
*FAX: 410-962-3091*

June 18, 2018



Mr. Michael E. Lawlor, Esq.
Mr. William C. Brennan, Jr.
Brennan, McKenna, & Lawlor, Chartered
6305 Ivy Lane, Suite 700
Greenbelt, MD 20770

Re: *United States v. Atif Babar Malik*
Criminal No. MJG-16-0324

Dear Counsel:

This letter, together with the Sealed Supplement, confirms the plea agreement that has been offered to the Defendant by the United States Attorney's Office for the District of Maryland ("this Office" or "the Government"). If the Defendant accepts this offer, please have him execute it in the spaces provided below. If this offer has not been accepted by the close of business on Friday, June 22nd, it will be deemed withdrawn. The terms of the agreement are as follows.

## Offense of Conviction

1. The Defendant agrees to plead guilty to Count Eighteen of the Superseding Indictment, which charges him with Conspiracy to Defraud the United States, in violation of 18 U.S.C. § 371. The Defendant admits that he is, in fact, guilty of that offense and will so advise the Court.[1]

[1] In addition to this charge, the Defendant was previously convicted at trial on October 27, 2017 on one count charging him with conspiracy to violate the Anti-Kickback Act and the Travel Act, in violation of 18 U.S.C. § 371; twelve counts charging him with soliciting and receiving illegal health care-related kickbacks, in violation of 42 U.S.C. § 1320a-7b(b)(1)(A); three counts charging him with violations of the Travel Act, in violation of 18 U.S.C. § 1952(a)(1) & (3); six counts charging him with health care fraud, in violation of 18 U.S.C. § 1347; and three counts charging him with false statements relating to health care matters, in violation of 18 U.S.C. § 1035(a)(1) & (a)(2). ECF # 272. As part of this plea agreement, the Defendant is also stipulating to the applicability of various factors that are pertinent to the calculation of his offense level as to these

## Elements of the Offense

2. The elements of the offense to which the Defendant has agreed to plead guilty, and which this Office would prove if the case went to trial as scheduled in September 2018, are as follows.

### Count Eighteen: Conspiracy to Defraud the United States

- First, that two or more persons agreed to defraud the United States, which means to cheat the United States government or any of its agencies out of money or property, or to obstruct or interfere with one of the United States' government's lawful functions by deceit, craft, trickery, or dishonest means;
- Second, that the Defendant knowingly and voluntarily became a member of the conspiracy; and
- Third, that a member of the conspiracy did one of the overt acts described in the Superseding Indictment for the purpose of advancing or furthering the objectives of the conspiracy.

## Penalties

3. The maximum sentence provided by statute for the offense in Count Eighteen to which the Defendant is pleading guilty is as follows: imprisonment for five (5) years, followed by a three (3) year term of supervised release, and a fine of up to $250,000.00, or (pursuant to 18 U.S.C. § 3571(d)), the greater of twice the Defendant's gross gain or the victims' gross loss). In addition, the Defendant must pay $100.00 as a special assessment pursuant to 18 U.S.C. § 3013, which will be due and should be paid at or before the time of sentencing. This Court may also order him to make restitution pursuant to 18 U.S.C. §§ 3663, 3663A, and 3664. If a fine or restitution is imposed, it shall be payable immediately, unless, pursuant to 18 U.S.C. § 3572(d), the Court orders otherwise.[2] The Defendant understands that if he serves a term of imprisonment, is released on supervised release, and then violates the conditions of his supervised

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previous convictions under the Federal Sentencing Guidelines, as set forth in ¶ 6 below, and is agreeing to withdraw his post-trial motions as set forth in ¶ 16 and to waive his appellate rights in regard to these convictions except in certain limited circumstances, as set forth in ¶ 17.

[2] Pursuant to 18 U.S.C. § 3612, if the Court imposes a fine in excess of $2,500 that remains unpaid 15 days after it is imposed, the Defendant shall be charged interest on that fine, unless the Court modifies the interest payment in accordance with 18 U.S.C. § 3612(f)(3).

commission of his offense, substitute assets, and/or a money judgment equal to the value of the property subject to forfeiture, pursuant to 18 U.S.C. § 982(a)(7).

13. The Defendant agrees to consent to the entry of orders of forfeiture for such property and waives the requirements of Federal Rules of Criminal Procedure 11(b)(1)(J), 32.2 and 43(a) regarding notice of the forfeiture in the charging instrument, advice regarding the forfeiture at the change-of-plea hearing, announcement of the forfeiture at sentencing, and incorporation of the forfeiture in the judgment.

**Assisting the Government with Regard to the Forfeiture**

14. The Defendant agrees to assist fully in the forfeiture of the aforementioned assets. The Defendant agrees to disclose all of his assets and sources of income to the United States, and to take all steps necessary to pass clear title to the forfeited assets to the United States, including but not limited to executing any and all documents necessary to transfer such title, assisting in bringing any assets located outside of the United States within the jurisdiction of the United States, and taking whatever steps are necessary to ensure that assets subject to forfeiture are not sold, disbursed, wasted, hidden or otherwise made unavailable for forfeiture. The Defendant also agrees to give this Office permission to request and review his federal and state income tax returns, and any credit reports maintained by any consumer credit reporting entity, until such time as the money judgment is satisfied. In this regard, the Defendant agrees to complete and sign a copy of IRS Form 8821 (relating to the voluntary disclosure of federal tax return information) as well as whatever disclosure form may be required by any credit reporting entity. The Defendant further agrees to provide the United States with an affidavit identifying all of his sources of income and all assets in which he any form of ownership or beneficial interest.

**Waiver of Further Review of Forfeiture**

15. The Defendant further agrees to waive all constitutional, legal and equitable challenges (including direct appeal, habeas corpus, or any other means) to any forfeiture carried out in accordance with this Plea Agreement on any grounds, including that the forfeiture constitutes an excessive fine or punishment. The Defendant also agrees not to challenge or seek review of any civil or administrative forfeiture of any property subject to forfeiture under this agreement, and will not assist any third party with regard to such challenge or review or with regard to the filing of a petition for remission of forfeiture.

**Waiver of Appeal**

16. In exchange for the concessions made by this Office and the Defendant in this plea agreement, this Office and the Defendant waive their rights to appeal as follows:

a. The Defendant knowingly waives all right, pursuant to 28 U.S.C. § 1291 or otherwise, to appeal the Defendant's conviction as to Count Eighteen or any of the counts on which he was convicted at trial (Counts One through Fourteen, Sixteen through Seventeen, and Nineteen through Twenty-Seven) on any ground whatsoever. This includes a waiver of all right to appeal the Defendant's conviction on the ground that the statute to which the Defendant is pleading guilty is unconstitutional, or on the ground that the admitted conduct does not fall within the scope of the statute.

b. The Defendant and this Office knowingly waive all right, pursuant to 18 U.S.C. § 3742 or otherwise, to appeal whatever sentence is imposed on him (including any term of imprisonment, fine, term of supervised release, or order of restitution) in this case on all of his counts of conviction, both from the trial and from this plea agreement, for any reason (including any issues that relate to the establishment of the advisory guidelines range, the determination of the Defendant's criminal history, the weighing of the sentencing factors, and any constitutional challenges to the calculation and imposition of any term of imprisonment, fine, order of forfeiture, order of restitution, and term or condition of supervised release).

c. Nothing in this agreement shall be construed to prevent the Defendant or this Office from invoking the provisions of Federal Rule of Criminal Procedure 35(a), or from appealing from any decision thereunder, should a sentence be imposed that resulted from arithmetical, technical, or other clear error.

d. The Defendant waives any and all rights under the Freedom of Information Act relating to the investigation and prosecution of the above-captioned matter and agrees not to file any request for documents from this Office or any investigating agency.

**Obstruction or Other Violations of Law**

17. The Defendant agrees that he will not commit any offense in violation of federal, state or local law between the date of this agreement and his sentencing in this case. In the event that the Defendant (i) engages in conduct after the date of this agreement which would justify a finding of obstruction of justice under U.S.S.G. § 3C1.1, or (ii) fails to accept personal responsibility for his conduct by failing to acknowledge his guilt to the probation officer who prepares the Presentence Report, or (iii) commits any offense in violation of federal, state or local law, then this Office will be relieved of its obligations to the Defendant as reflected in this agreement. Specifically, this Office will be free to argue sentencing guidelines factors other than those stipulated in this agreement, and it will also be free to make sentencing recommendations other than those set out in this agreement. As with any alleged breach of this agreement, this Office will bear the burden of convincing the Court of the Defendant's obstructive or unlawful behavior and/or failure to acknowledge personal responsibility by a preponderance of the evidence. The Defendant acknowledges that he may not withdraw his guilty plea

because this Office is relieved of its obligations under the agreement pursuant to this paragraph.

**Court Not a Party**

18. The Defendant expressly understands that the Court is not a party to this agreement. In the federal system, the sentence to be imposed is within the sole discretion of the Court. In particular, the Defendant understands that neither the United States Probation Office nor the Court is bound by the stipulation set forth above, and that the Court will, with the aid of the Presentence Report, determine the facts relevant to sentencing. The Defendant understands that the Court cannot rely exclusively upon the stipulation in ascertaining the factors relevant to the determination of sentence. Rather, in determining the factual basis for the sentence, the Court will consider the stipulation, together with the results of the presentence investigation, and any other relevant information. The Defendant understands that the Court is under no obligation to accept this Office's recommendations, and the Court has the power to impose a sentence up to and including the statutory maximum stated above. The Defendant understands that if the Court ascertains factors different from those contained in the stipulation set forth above, or if the Court should impose any sentence up to the maximum established by statute, the Defendant cannot, for that reason alone, withdraw his guilty plea, and will remain bound to fulfill all of his obligations under this agreement. The Defendant understands that neither the prosecutor, his counsel, nor the Court can make a binding prediction, promise, or representation as to what guidelines range or sentence the Defendant will receive. The Defendant agrees that no one has made such a binding prediction or promise.

**Entire Agreement**

19. This letter supersedes any prior understandings, promises, or conditions between this Office and the Defendant and, together with the Sealed Supplement, constitutes the complete plea agreement in this case. The Defendant acknowledges that there are no other agreements, promises, undertakings or understandings between the Defendant and this Office other than those set forth in this letter and the Sealed Supplement and none will be entered into unless in writing and signed by all parties.

If the Defendant fully accepts each and every term and condition of this agreement, please sign and have the Defendant sign the original and return it to me promptly.

Very Truly Yours,

ROBERT K. HUR
UNITED STATES ATTORNEY

By: _____
Jefferson M. Gray
Sean R. Delaney
Assistant United States Attorneys

I have read this agreement, including the Sealed Supplement, and carefully reviewed every part of it with my attorneys. I understand it, and I voluntarily agree to it. Specifically, I have reviewed the Factual and Advisory Guidelines Stipulation with my attorneys, and I do not wish to change any part of it. I am completely satisfied with the representation of my attorneys.

6/25/18
Date

_____
Atif Babar Malik, M.D.

We are Dr. Malik's attorneys. We have carefully reviewed every part of this agreement, including the Sealed Supplement, with him. He advises us that he understands and accepts its terms. To our knowledge, his decision to enter into this agreement is an informed and voluntary one.

6/25/18
Date

_____
Michael E. Lawlor

_____
William C. Brennan, Jr.

# APPENDIX A4

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 18-4688

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UNITED STATES OF AMERICA,

Appellee,

v.

ATIF BABAR MALIK,

Appellant.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THE HONORABLE MARVIN J. GARBIS,
(UNITED STATES DISTRICT JUDGE)

# BRIEF OF APPELLANT

RESPECTFULLY SUBMITTED,

JAMES WYDA
FEDERAL PUBLIC DEFENDER
FOR THE DISTRICT OF MARYLAND

JOANNA SILVER
ASSISTANT FEDERAL PUBLIC
DEFENDER
6411 IVY LANE, 7th FLOOR
GREENBELT, MARYLAND 20770
(301) 344-0600
joanna_silver@fd.org

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**STATE STATUTES**

## JURISDICTIONAL STATEMENT

The district court had jurisdiction in this case under 18 U.S.C. § 3231. The court entered its judgment on September 19, 2018. Joint Appendix at 272 [hereinafter J.A.]. Dr. Malik filed a notice of appeal on September 23, 2018. J.A. at 279. This Court has jurisdiction under 28 U.S.C. § 1291.

## ISSUE PRESENTED

The government charged Dr. Malik with multiple counts of violating and conspiring to violate the Travel Act based on his participation in a scheme in which he was paid to refer urine specimens from patients he treated in the state of Maryland to a laboratory located in the state of New Jersey. The predicate offense alleged under the Travel Act counts was a violation of New Jersey's commercial bribery statute, which required Dr. Malik to have accepted a benefit as consideration for knowingly violating a duty of fidelity to which he was subject as a physician under the laws of the state of New Jersey.

Dr. Malik and co-conspirator Dr. Sherkelar were the only physicians involved in the conspiracy to violate the Travel Act and the substantive Travel Act counts. While the men were licensed to practice

medicine in both Maryland and New Jersey, their only practice of medicine in furtherance of the kickback scheme took place in the state of Maryland. The alleged course of conduct thus fell outside the reach of the New Jersey commercial bribery statute and could never have violated the charged offense. Did the district court err in denying Dr. Malik's motion to dismiss?

## STATEMENT OF THE CASE

### I. Procedural History

On June 28, 2016, Dr. Atif Babar Malik was charged in a 29-count indictment, along with several alleged co-conspirators. J.A. at 37. On July 27, 2017, the government filed a superseding indictment charging Dr. Malik with, among other things, one count of conspiracy to violate the Anti-Kickback Act and the Travel Act, in violation of §18 U.S.C. 371, and four counts of violating the Travel Act, in violation of 18 U.S.C. §1952(a)(1) & (a)(3). J.A. at 71. The superseding indictment specified that the conspiracy to violate the Travel Act, as well as the substantive Travel Act counts, were committed in violation of the New Jersey State Commercial Bribery Statute, N.J. Stat. Ann. § 2C:21-10. J.A. at 77, 92.

On September 8, 2017, Dr. Malik filed a motion to dismiss the

conspiracy count, in part, and all four Travel Act counts, and to strike any related allegations from the indictment. J.A. at 109. Dr. Malik argued that the alleged conduct underlying the Travel Act charges did not violate New Jersey's commercial bribery statute and that those charges must therefore be dismissed. *Id.* The government filed a response in opposition and Dr. Malik filed a reply to that response. J.A. at 175, 202. On September 29, 2017, the district court conducted a hearing on a number of pretrial motions, including Dr. Malik's motion to dismiss the indictment, and on October 6, 2017, the court issued a memorandum opinion in which it denied the motion. J.A. at 280, 502.

Dr. Malik appeared for a trial by jury beginning on October 11, 2017. J.A. at 20. On October 24, 2017, the district court granted the government's oral motion to dismiss one of the four substantive Travel Act Counts: count 15 of the superseding indictment. J.A. at 214-16. On October 27, 2017, the jury returned a guilty verdict on all remaining counts that had been presented to the jury, including Count 1, the conspiracy count, and the three remaining Travel Act counts: Counts 14, 16, and 17 of the superseding indictment. J.A. at 217.

On June 25, 2018, Dr. Malik entered into an agreement with the

government in which he agreed to enter a guilty plea to Count 18 of the superseding indictment, a charge of Conspiracy to Defraud the United States that had been severed from the remaining counts prior to trial. J.A. at 225. The plea agreement contained a statement of facts and a jointly proposed guideline calculation encompassing conduct underlying Count 18 of the superseding indictment, as well as conduct proven through evidence introduced at trial in support of the guilty verdicts returned by the jury on the remaining counts of the indictment. J.A. at 238-50. The agreement contains a waiver of Dr. Malik's rights to appeal all of his counts of conviction, including those sustained at trial. J.A. at 234.

On June 25, 2018, Dr. Malik appeared in court to enter his guilty plea and on September 11, 2018, Dr. Malik appeared for sentencing. J.A. at 251, 269. The district court imposed a sentence of 60 months on a number of the counts of conviction, including counts 1, 14, 16, and 17: the conspiracy and substantive Travel Act counts. J.A. at 272. The district court imposed a sentence of 96 months on the remaining counts, to run concurrent with the 60 months previously imposed. *Id.* Dr. Malik received a 3-year period of supervised release and was ordered to

pay restitution of over $1.3 million. *Id.* On September 23, 2018, Dr. Malik filed a notice of appeal. J.A. at 279. This appeal followed.

## II. Factual History

### A. The Superseding Indictment

The superseding indictment contains the following allegations relevant to the Travel Act counts that are the subject of this appeal:

During the relevant time period, Dr. Malik was a resident of both New Jersey and Maryland and was a physician trained in pain management. J.A. at 71. Advanced Pain Management Services, LLC (APMS) was a Maryland company operating a medical practice specializing in pain management with multiple offices located in Maryland. J.A. at 71-72. APMS formed in 2009 through the merger of a Frederick, Maryland based pain management practice belonging to Dr. Sandeep Sherlekar, a Maryland resident, and the Maryland-based portion of Dr. Malik's pain management practice. J.A. at 72. Dr. Malik continued to operate a separate pain management practice from offices located in central New Jersey. J.A. at 72. Dr. Malik saw patients of APMS in Maryland from mid-day Wednesday through Friday. J.A. at 72.

Drs. Malik and Sherlekar were the only people who held ownership interests in APMS. J.A. at 72. Muhammad Ahmad Khan, a Maryland resident, was the Chief Executive Officer (CEO) of APMS from February 2009 through August 31, 2012. J.A. at 72-73. Vic Wadha, a resident of New Jersey, was the Chief Financial Officer of APMS from December 2009 through August 31, 2012. J.A. at 73. Mr. Wadha worked part-time at a medical practice in New Jersey that was owned, in part, by Drs. Sherlekar and Malik. J.A. at 73.

"Laboratory Testing Company 1" was a New Jersey company with its principal place of business located in Linden, New Jersey; Konstantin Bas was its Chief Executive Officer. J.A. at 73. Konstantin Bas owned "Surgical Supply Company 1," which had its principal place of business in Brooklyn, New York, and provided medical and surgical supplies. J.A. at 73. Mubtagha Shah Syed was a resident of New Jersey who solicited medical practices to refer patient blood and urine specimens from medical practices to Laboratory Testing Company 1. J.A. at 73-74. Mr. Syed registered a corporation called Monaco Consulting, LLC in New Jersey and opened a bank account at HSBC Bank in its name. J.A. at 74.

APMS provided pain management services for spine-related conditions, and frequently prescribed controlled substances to its patients as part of this practice. J.A. at 75. APMS periodically required these patients to submit urine specimens for testing in order to monitor the levels of pain medication or other narcotics in their bodies. J.A. at 75. From Spring 2011 through August 2012, APMS patients provided approximately 700 to 1000 urine toxicology specimens each month. J.A. at 75. When APMS patients submitted urine specimens, the specimens were collected by an on-site technician employed by the outside testing laboratory to which APMS referred the samples for evaluation. J.A. at 75.

Beginning on or about February 2011 and continuing thereafter until in or about August 2012, "in the District of Maryland and elsewhere," Drs. Malik and Sherleker, Muhammad Khan, Vic Wadhaw, Konstantin Bas, and Mubtaghan Syed conspired to violate the Travel Act and the New Jersey Commercial Bribery Statute, N.J. Stat. Ann. §2C:21-10 through the following means: Mr. Bas offered to and did pay monetary kickbacks to Drs. Malik and Sherlekar, and to Messrs. Khan and Wadha to induce them to refer patients of APMS to Laboratory

Testing Company 1 for the furnishing of urine toxicology testing services and to Surgical Supply Company 1 for the furnishing of back braces. J.A. at 76.

It was a part of the conspiracy and scheme that Vic Wadhwa traveled to Laboratory Testing Company 1's offices in New Jersey once a month to determine how many samples had been submitted for testing and to calculate the amount owed by Laboratory Testing Company 1 in kickback and bribe payments. J.A. at 79. It was part of the conspiracy and scheme that the initial kickback and bribe payments by Laboratory Testing Company 1 were made to Monaco Consulting, LLC and that the first two checks for the payments of monetary kickbacks and bribes were written to Drs. Malik and Sherlekar from Monaco Consulting. J.A. at 79.

In furtherance of the conspiracy, in February 2011, Dr. Malik and Mr. Khan met in Maryland to discuss Mr. Syed's proposal that APMS start referring its urine toxicology testing to Laboratory Testing Company 1 in return for payments of kickbacks and bribes. J.A. at 81. "In or about the latter part of February or the first week of March 2011," Mr. Wadhwa met with Mr. Bas in New Jersey to discuss the

arrangement. J.A. at 82. Starting in April 2011, APMS began referring its urine toxicology specimens from Maryland to Laboratory Testing Company 1 in New Jersey. J.A. at 82.

On June 29, 2011, Mr. Wadhwa registered a new company named Munich Management Consulting, LLC with the New Jersey Department of the Treasury, and subsequently opened a bank account in Munich Management Consulting's name. J.A. at 83. In early August, 2011, Messrs. Khan and Wadhwa established a company named Efficient Management & Consulting, LLC. J.A. at 80. From June, 2011 through August 2012, money was sent from Laboratory Testing Company 1 to Monaco Consulting and Munich Consulting or to Efficient Management & Consulting, and then from Efficient Management & Consulting to Dr. Malik. J.A. at 83 – 89.

Counts 14 through 17 of the indictment allege the following four overt acts taken in violation of the Travel Act and the New Jersey Commercial Bribery Statute: 1) on December 14, 2011, a check for $11,987.50 from the account of Efficient Management made out to Dr. Malik was transmitted by Federal Express from Frederick, Maryland to New York, New York; 2) on January 3, 2012, an email was sent from Mr.

Wadhwa in New Jersey to "Individual A" in Maryland asking her to "pls remind me to cut checks from emc to ss n am;" 3) on May 1, 2012, Mr. Wadhwa traveled from New Jersey to Maryland while carrying checks made payable to Munich Management by Laboratory Testing Company 1; and 4) on May 30, 2012, Mr. Wadhwa traveled from New Jersey to Maryland while carrying checks made payable to Munich Management by Laboratory Testing Company 1. J.A. at 93.

### B. Dr. Malik's Motion to Dismiss the Indictment

Dr. Malik filed a motion to dismiss the indictment arguing that the Travel Act charges were deficient as a matter of law because the alleged intended conduct does not violate the New Jersey commercial bribery statute and a Travel Act charge requires a determination that the underlying state law has been or could have been violated.[1] J.A. at 118-126. Dr. Malik explained that, "[A]s a matter of New Jersey law, the New Jersey commercial bribery statute does not reach the conduct that Dr. Malik allegedly intended to occur or in which his purported co-conspirators allegedly engaged." J.A. at 120. Specifically, Dr. Malik

[1]Dr. Malik also argued that the Travel Act charges violate due process and core principles of federalism. Because those arguments do not affect the district court's jurisdiction, Dr. Malik is not raising them in this appeal.

argued that neither he nor any other APMS doctor could have violated a duty of fidelity as physicians under New Jersey law by making referrals of urine specimens and of prescriptions for back braces when practicing medicine in Maryland, in return for bribes that may have affected the professional judgments he, or any APMS doctor made in Maryland. J.A. at 121.

In its response, the government focused on the "extensive contacts" that Dr. Malik and members of the alleged conspiracy had with the state of New Jersey as part of the "referrals-for-kickbacks" agreement. J.A. at 175. In so doing, the government added facts it planned to prove at trial that were not included in the indictment. For example, the government alleged that Dr. Malik was "a physician who was licensed in both New Jersey and Maryland and who maintained offices and practiced in both states." J.A. at 175. In addition, the government alleged that for the first couple of months of the unlawful kickback arrangement, checks were delivered from Laboratory Testing Company 1 to Mr. Syed, in New Jersey, who deposited them into the account of Monaco Consulting. J.A. at 176. After writing checks initially to Drs. Malik and Sherlekar, Mr. Syed subsequently wrote checks to Munich

Management and, "on most occasions," Mr. Wadha deposited these checks at a HSBC branch in New Jersey. J.A. at 176.

The government also clarified that Efficient Management & Consulting was located in Frederick, Maryland, and that at some point, kickback checks to Drs. Malik and Sherlekar began to be written from Efficient's bank account. J.A. at 177. These checks were sent to an HSBC bank officer for deposit in New Jersey and then after a period of time in New York. J.A. at 177.

### C. The District Court's Ruling

The district court heard argument on Dr. Malik's motion, along with a number of other pretrial and *in limine* motions, on September 29, 2017. J.A. at 280. On October 5, 2017, the district court issued a lengthy memorandum opinion in which it ruled on all of the pending motions. J.A. at 502. The district court addressed Dr. Malik's motion to dismiss the Travel Act-related counts in less than four pages. J.A. at 529-533. The court described Dr. Malik's characterization of the facts supporting the Travel act counts as "incomplete," and described the indictment as charging crimes "committed with significant New Jersey

contacts relating to the scheme agreement, claim processing, and payments." J.A. at 530.

The court referred to the following alleged facts in support of this conclusion: 1) Dr. Malik is licensed in both Maryland and New Jersey, and maintained offices and practices in both states; 2) the laboratory that paid kickbacks to Dr. Malik is located in New Jersey; 3) specimens were taken in the Maryland APMS clinic by a member of the New Jersey laboratory testing company and transported from Maryland to New Jersey; 4) results were sent from New Jersey to Dr. Malik's clinics; 5) the scheme involved a person – Vic Wadhwa – travelling interstate between Maryland and New Jersey; and 6) some of the checks were allegedly deposited in New Jersey. J.A. at 531. The court did not cite to any cases to support the conclusion that the above-described facts could legally support a violation of New Jersey's bribery law.

The district court then rejected Dr. Malik's argument that the New Jersey bribery statute does not create a duty of fidelity under the commercial bribery statute for licensed New Jersey doctors practicing medicine in the state of Maryland. J.A. at 531. The court based this conclusion on the fact that, "the 'duty of fidelity' in the New Jersey

commercial statute has not been fully defined." J.A. at 531. Without citing any cases, the district court "decline[d] to accept Defendant's narrow interpretation" of the New Jersey law. J.A. at 531.

## SUMMARY OF ARGUMENT

Dr. Atif Malik was convicted of a number of offenses arising from a scheme in which he and other men affiliated with a medical practice in Maryland received money from a laboratory in New Jersey in exchange for sending their Maryland patients' urine to that laboratory for testing. This appeal concerns the narrow issue of whether the district court erred in maintaining jurisdiction over the offenses charged under 18 U.S.C. §1952, the Travel Act.

The Travel Act prohibits travel in interstate commerce or the use of the mail or another facility in interstate commerce with the intent to distribute the proceeds of, further, or carry on any unlawful activity. The unlawful activity—a violation of a state extortion, bribery, or arson statute—is an element of the Travel Act offense and where it is legally impossible for the alleged activity to violate the underlying state law, a Travel Act charge cannot stand.

The underlying state law charged in Dr. Malik's indictment is New

Jersey's commercial bribery statute, which prohibits the solicitation or acceptance of any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity; in this case, Dr. Malik's duty as a physician. However, it is legally impossible for Dr. Malik to have violated this law because the only practice of medicine alleged by the government in this case took place in the state of Maryland.

The New Jersey commercial bribery statute does not prohibit physicians licensed in New Jersey from accepting a benefit in exchange for consideration given while practicing medicine in another state. The district court recognized this, describing the duty of fidelity under New Jersey law as "not fully defined," and failing to cite a single authority in support of its decision to reject Dr. Malik's motion to dismiss the indictment. The district court's decision to interpret the undefined duty of fidelity in New Jersey's law in a manner that is adverse to Dr. Malik violates the rule of lenity; it made Dr. Malik responsible for a violation of a statute with uncertain terms and allowed the district court to define a New Jersey legal standard that neither New Jersey's courts nor its legislature have defined themselves.

That Dr. Malik, his co-conspirators, and the kickback scheme itself

had significant ties to New Jersey cannot create liability under the New Jersey commercial bribery statute. While connections with another state are required for the interstate commerce nexus element of a Travel Act offense, the violation of an underlying state law is anelement that must be separately alleged and proven. As other cases analyzing the Travel Act reveal, even the most ethically or morally repugnant conduct may not sustain a Travel Act charge if that conduct does not violate the predicate state law. In this case, there are many bases for criminal liability for Dr. Malik's conduct, but the Travel Act is not one of them. As a result, the district court erred in denying Dr. Malik's motion to dismiss the indictment. The district court never had jurisdiction over the Travel Act charges and therefore this Court must vacate Dr. Malik's Travel Act convictions and remand the case for resentencing.

## ARGUMENT

**The District Court Erred in Denying Dr. Malik's Motion to Dismiss the Indictment Because Dr. Malik's Acceptance of Kickbacks for His Practice of Medicine in Maryland Could Not Have Violated a Duty of Fidelity to Patients in New Jersey.**

### A. Standard of Review

This Court reviews a District Court's factual findings with respect to jurisdiction for clear error and legal conclusions *de novo*. *U.S. ex rel. Vuyyruru v. Jadhav*, 555 F.3d 337, 348 (4th Cir. 2009).

### B. A Person Cannot Violate The Travel Act If The Activities He Intended To Facilitate In Another State Did Not Violate The Predicate State Law.

The Travel Act, 18 U.S.C.A. §1952, prohibits travel in interstate or foreign commerce, or use of the mail or any facility in interstate or foreign commerce, with the intent to distribute the proceeds of, further, or otherwise promote, manage, establish, or carry on, any unlawful activity. As defined by the statute, "unlawful activity," includes extortion, bribery, or arson "in violation of the laws of the State in which committed." 18 U.S.C.A. §1952(b). *See also, Perrin v. United States*, 444 U.S. 37, 50 (1979) (the statute reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to

reinforce state law enforcement by encompassing conduct in violation of state commercial bribery statutes).

"It is generally recognized that 'the existence of a state law violation is an element of the violation of the Travel Act and that the court must make a determination of whether the underlying state law has been or could have been violated.'" *United States v. Loucas*, 629 F.2d 989, 991 (4th Cir. 1980). Thus, where a Travel Act charge is based on an intended violation of a specific state law and it is legally impossible for the intended conduct to have violated that law, courts find that the Travel Act charge cannot stand.

For example, in *United States v. Brown*, 505 F. 2d 261, 262 (4th Cir. 1974), the defendant was convicted of a Travel Act violation based on his bribery of a Deputy State Highway Commissioner, in violation of West Virginia state law. While *Brown* was pending appeal in this Court, the West Virginia Supreme Court held that the Deputy State Highway Commissioner is not a ministerial officer within the meaning of the state bribery statute and thus he could not be bribed. *Id.* This Court concluded that it was bound by the West Virginia Supreme Court's construction of its law and that this Court's view of the bribery statute

"is of no moment." *Id.* At 263. Applying a plain error standard of review, this Court vacated the Travel Act conviction. *Id.*

Similarly, the First Circuit Court of Appeals set aside a Travel Act conspiracy conviction where the statute the conspirators intended to violate—Puerto Rico's bribery law—had been repealed at the time of the intended interstate travel. *United States v. Fernandez*, 722 F.3d 1, 31-32 (1st Cir. 2013). The First Circuit described the unusual factual scenario—the legislature decided to repeal the relevant Puerto Rico bribery law prior to the conspirators' agreement and the repeal went into effect two weeks before the conspirators were to have traveled in furtherance of their agreement—as one of "pure legal impossibility." *Id.* The court thus concluded that the defendant was entitled to a judgment of acquittal on the Travel Act conspiracy count. *Id.* at 32, 34.

Lastly, the Fifth Circuit Court of Appeals set aside a Travel Act conviction where it was not legally possible for the defendant to have violated the predicate Louisiana commercial bribery statute because the person he bribed was not a "private fiduciary" within the meaning of the statute. *United States v. Tonry*, 837 F.2d 1281, 1286 (5th Cir. 1988). The target of the bribe was the Chairman of an Indian tribe and the

government argued that because an official of an Indian tribe cannot be a "public official" of the state of Louisiana under Louisiana's public bribery statute, he must be a "private fiduciary" within the meaning of Louisiana's commercial bribery statute. *Id.* at 1282-83.

The Fifth Circuit disagreed, finding that the Chairman of an Indian Tribe is a "non-Louisiana public official" and that, in bribing the Chairman, the defendant "committed no crime under Louisiana law," no matter how "ethically or morally repugnant his conduct may have been." *Id.* at 1285. Thus, the court vacated the defendant's Travel Act convictions and entered judgments of acquittal. *Id.* 1281.

### C. The New Jersey Commercial Bribery Statute Does Not Prohibit Physicians Licensed In New Jersey From Accepting A Benefit In Exchange For A Referral Made While Practicing Medicine In Other States.

As in the cases discussed above, it is legally impossible for Dr. Malik to have violated the New Jersey commercial bribery statute as alleged in the indictment. As a result, the district court never had jurisdiction over the Travel Act counts.

The Travel Act counts in this case are based on alleged violations of the New Jersey State Commercial Bribery Statute, N.J. Stat. Ann. §2C:21-10. J.A. at 7, 22. That statute states that "a person commits a

crime if he solicits, accepts or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject . . .." N.J. Stat. Ann. §2C:21-10(a). As alleged in the superseding indictment and the government's response to Dr. Malik's motion to dismiss, the "duty of fidelity," to which Dr. Malik was alleged to have been subject was that of a physician. N.J. Stat. Ann. §2C:21-10(a)(3) ("a lawyer, physician, accountant, appraiser, or other professional adviser ").

In denying Dr. Malik's motion to dismiss the Travel Act counts, the district court concluded that the duty of fidelity in the New Jersey commercial statute "has not been fully defined." J.A. at 531. This conclusion is correct; courts have not fully defined the duty of fidelity of a physician under New Jersey's commercial bribery statute. To the degree that the duty of fidelity between a New Jersey physician and her patients has been addressed by any courts, those courts have not held that a New Jersey physician violates a duty of fidelity by accepting a benefit in exchange for a referral made while practicing medicine in other states.

"New Jersey has a heavy and traditional interest in regulating the practice of medicine *within its borders*." *Zahl v. Harper*, 282 F. 3d 204, 210-11 (3rd Cir. 2002), emphasis added. Not surprisingly, therefore, New Jersey state cases regarding the duty of a doctor to his patient focus on the relationship between doctors and their patients in New Jersey arising from the practice of medicine in the state of New Jersey. *See, e.g., Stigliano by Stigliano v. Connaught Laboratories, Inc.*, 140 N.J. 305, 720 (1995) (holding that part of the fiduciary relationship between a doctor and her patient includes a duty to testify in judicial proceedings about treatment rendered to the patient); *Perna v. Pirozi*, 92 N.J. 446, 463-64 (1983) (holding that a physician's fiduciary duty to her patient prohibits the substitution of one surgeon for another without the patient's consent); *Piller by Piller v. Kovarsky*, 194 N.J. Super. 392, 399 (1984) (concluding that the fiduciary nature of the relationship between a physician and her patient should preclude a physician from testifying against the patient as a liability expert in a medical malpractice action involving the very condition for which the physician has treated the patient).

Despite the strong interest of the state of New Jersey in regulating the practice of medicine within its borders, there appear to be no New Jersey state cases defining the duty of fidelity of a physician licensed in the state under its commercial bribery statute. Moreover, only one, unpublished, opinion addressing this duty exists in a federal case.[2] That case, discussed at length by the parties below, is *United States v. Greenspan*, 2016 WL 4402822 (D.N.J. 2016), unpublished. In *Greenspan*, the district court acknowledged that neither the Third Circuit Court of Appeals nor the New Jersey Supreme Court have defined the duty of fidelity owed by a physician under the New Jersey commercial bribery statute. *Id.* at *13. The court acknowledged further that neither the New Jersey State Board of Medical Examiners' statute nor the New Jersey Medical Board's regulations define the duty of fidelity owed by physicians as referenced in the New Jersey commercial bribery statute. *Id.*

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[2]In the proceedings below, the government relied heavily on a second case from the District of New Jersey, *United States v. Ostrager*, Case No. 15-0399 (D.N.J. filed Oct. 26, 2015). However, while the district court in *Ostrager* denied a motion to dismiss the indictment that was made on grounds similar to those advanced by Dr. Malik, it never issued an opinion. As a result, the government's reliance on *Ostrager* in the instant case was based only on the parties' filings and this Court should disregard them. J.A. at 196.

Nevertheless, the district court concluded that a Medical Board regulation entitled "Professional Fees and Investments, Prohibition of Kickbacks," "explicitly prohibits the acceptance of bribes and kickbacks by doctors licensed in New Jersey," and that this regulation brought Dr. Greenspan's conduct within the scope of New Jersey's commercial bribery statute. *Id.*, citing, NJ ADC 13:35-6.17(c)(1)(2016). This conclusion was made, however, in the context of Dr. Greenspan's alleged acceptance of bribes from a blood testing center, given in exchange for referrals of blood samples *taken in the state of New Jersey, from New Jersey patients, to that New Jersey testing center*. *Id.* at 14. *Greenspan* did not even begin to contemplate what duty a doctor licensed in New Jersey had to patients outside the state of New Jersey, and it certainly did not hold that a doctor licensed in New Jersey has a duty of fidelity to all people in the state of New Jersey, regardless of where he was practicing medicine.

Reliance on this unpublished opinion for the proposition that the medical board regulation creates a broad duty of fidelity arising from the practice of medicine outside the state of New Jersey is undermined further by the fact that the regulation at issue in *Greenspan* does not

mention the out-of-state practice of medicine, but the New Jersey Board of Medical Examiners Statute contains two provisions that do. Specifically, New Jersey requires its doctors to report adverse actions taken against them by other states to the Board of Medical Examiners and it permits the Board to suspend or revoke a physician's license based on those actions. *See* N.J. Stat. Ann. §45:9-19.16 and §45:9-19.16a.

The two relevant statutes require physicians to notify the State Board of Medical Examiners within 10 days of "any action taken against the physician's medical license by another state licensing board or any action affecting the physician's privileges to practice medicine by any out-of-State hospital, health care facility, health maintenance organization or other employer," and "any pending or final action by any criminal authority for violations of law or regulation, or any arrest of or conviction for any criminal or quasi-criminal offense. . ." §45:9-19.16. Additionally, the Board of Medical Examiners can suspend or revoke a physician's license if it receives documentation regarding actions by out-of-state authorities suggesting that continued practice would endanger or pose a risk to the public health or safety, or documentation demonstrating that the adverse action by another state is based on facts

which would provide a basis for disciplinary action in New Jersey, involving gross or repeated negligence, fraud, or other professional misconduct adversely affecting the public health, safety, or welfare. *See* §45:9-19.16a

These statutes appear to be the only ones that create any obligations on the part of physicians licensed in New Jersey based on their practice of medicine in other states, and they appears to be based not on the conduct of the physician, but on the actions taken by other state agencies against the physician. These statutes suggests a far more narrow reading of the *Greenspan* opinion than the government urged below and they support the conclusion that there exists no prohibition on the acceptance of a benefit from a doctor licensed in New Jersey in exchange for a referral made by that doctor while practicing medicine in another state.

### D. The District Court Violated The Rule Of Lenity When It Interpreted The Duty Of Fidelity In New Jersey's Commercial Bribery Statute In A Manner That Is Adverse To Dr. Malik.

The district court's ruling on Dr. Malik's motion was brief. The court did not say what it believed the duty of fidelity of a physician is under the New Jersey commercial bribery statute, nor did it cite to any

cases or statutes to illustrate what it might be. Instead, the court said only that, "because the 'duty of fidelity' in the New Jersey commercial statute has not been fully defined, the Court declines to accept Defendant's narrow interpretation." J.A. at 531. This rejection of Dr. Malik's interpretation in favor of an unarticulated, yet clearly adverse interpretation of the duty of fidelity, while acknowledging that the duty has not been fully defined, violates the rule of lenity. A correct application of the rule warrants reversal of the district court's decision.

"The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008), citing, *United States v. Gladwell*, 243 U.S. 476, 485 (1917); *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *United States v. Bass*, 404 U.S. 336, 347-349 (1971). This "venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain . . .It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead." *Santos*, 553 U.S. at 514.

The Fifth Circuit Court of Appeals addressed the rule of lenity in considering the Louisiana statute that was the predicate offense for the Travel Act allegation in the above-discussed case of *United States v. Tonry*. 837 F.2d at 1284. While the court ultimately concluded that the plain meaning of the word "private" did not apply to the Chairman of an Indian Tribe, the court explained that, had an ambiguity existed, it would not have been permitted to choose the "harsher" construction of the word. *Id.* at 1284.

The Fifth Circuit relied on Supreme Court precedent recognizing that "[w]hen there are two rational interpretations of a statute, one harsher than the other, the court may choose the harsher result only when the legislature has spoken in clear and definite language." *Id.*, citing *McNally v. United States*, 107 S.Ct. 2875, 2881 (1987), internal citations omitted. The Fifth Circuit concluded that the government's argument that the court should apply a loose interpretation of "private," simply because the strict interpretation of "public" did not apply to the Chairman of an Indian tribe, "works a perversion," of this rule. *Id.*

The district court's decision to interpret New Jersey's commercial bribery statute to cover the conduct alleged in Dr. Malik's case, where

the court itself acknowledged the ambiguity in the law, also "works a perversion" of the rule of lenity. The New Jersey statute states that, "a person commits a crime if he solicits, accepts or agrees to accept any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity to which he is subject as . . . a physician." N.J. Stat. Ann. §2C:21-10(a). There is no New Jersey statute and no case that defines the "duty of fidelity," of a New Jersey physician when he is practicing medicine in another state.

As is discussed above, there are two New Jersey statutes that address the circumstances in which physicians licensed in New Jersey can suffer disciplinary action and civil penalties for conduct occurring outside the state. *See* N.J. Stat. Ann. §45:9-19.16 and §45:9-19.16a. Those statutes do not define a duty of fidelity by licensed New Jersey physicians, nor do they create civil penalties or permit disciplinary actions simply for engaging in malfeasance through the practice of medicine in other states. Instead, the statutes create civil liability and permit disciplinary action as a result of actions taken by other state agencies against New Jersey doctors. *Id.*

The regulation relied on by the District of New Jersey in its unpublished opinion in *United States v. Greenspan*, on the other hand, says nothing about the practice of medicine in other states. *Greenspan*, 2016 WL 4402822 at 13, citing, NJ ADC 13:35-6.17(c)(1)(2016). Moreover, *Greenspan* recognized that no cases—either New Jersey state court cases or federal court cases—have applied this regulation in a commercial bribery case or separately defined the duty of fidelity under New Jersey law. 2016 WL 4402822 at 13. And, *Greenspan* relied on the regulation to find a duty of fidelity under New Jersey's commercial bribery statute only where a physician licensed in New Jersey accepted kickbacks for his practice of medicine in the state of New Jersey. *Id.*

Given the "undefined" state of the law in New Jersey and the facts of Dr. Malik's case, the rule of lenity requires an interpretation of the duty of fidelity in Dr. Malik's favor. The rule of lenity vindicates "the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain." *Santos*, 553 U.S. at 514. Here, Dr. Malik is alleged to have accepted money from a business located in New Jersey in exchange for actions he took while practicing medicine in the state of Maryland. He cannot be held

accountable for a violation of a duty of fidelity that *might* have applied under these circumstances.

The rule of lenity also "keeps courts from making criminal law in Congress's stead." *Id.* The application of this principle is particularly compelling where a federal court is being asked to define a state's law. Neither the district court, nor this Court, should define the duty of fidelity of a physician under New Jersey's commercial bribery statute when New Jersey itself has not been clear about what that duty is.

### E. Connections Between The Alleged Kickback Scheme And The State of New Jersey Are Irrelevant If Accepting Kickbacks While Practicing Medicine In Maryland Does Not Violate A Duty Of Fidelity Under New Jersey's Commercial Bribery Statute.

Following the government's lead, the district court focused its rejection of Dr. Malik's motion to dismiss on the nexus between activities undertaken in furtherance of the kickback scheme and the state of New Jersey. The court began by summarizing the facts as follows: "the instant offense involves an allegation of crimes committed with significant New Jersey contacts relating to the scheme agreement, claim processing, and payments." J.A. at 530. The court then listed several examples of these "significant" contacts: 1) Dr. Malik is licensed in both

Maryland and New Jersey, and maintained offices and practices in both states; 2) the laboratory that paid kickbacks to Dr. Malik is located in New Jersey; 3) specimens were taken in the Maryland APMS clinic by a member of the New Jersey laboratory testing company and transported from Maryland to New Jersey; 4) results were sent from New Jersey to Dr. Malik's clinics; 5) the scheme involved a person – Vic Wadhwa – travelling interstate between Maryland and New Jersey; and 6) some of the checks were allegedly deposited in New Jersey. J.A. at 531. While these facts may be sufficient to support the interstate commerce nexus required for a Travel Act charge, they do not create a duty of fidelity arising from Dr. Malik's position as a New Jersey physician while practicing medicine in the state of Maryland.

The degree to which a defendant or his co-conspirators had contact with the state whose law he was alleged to have intended to violate is separate from the question of whether it was legally possible for the defendant to have violated that law. If it was legally impossible for the defendant to have violated the predicate law, no degree of contact with the state whose statute is under consideration can amount to a Travel Act violation.

For example, in *United States v. Tonry*, where the Louisiana commercial bribery statute was at issue, the allegedly unlawful payment to the Chairman of the Indian tribe was made in New Orleans, Louisiana, not on the Indian reservation. *Tonry*, 837 F.2d at 1281. In addition, the defendant and the Chairman traveled from New Orleans to the Bureau of Indian Affairs in Washington, D.C. as part of the bribery agreement. *Id.* Because the Fifth Circuit's holding was rooted in the question of whether the Chairman of an Indian tribe is a "private fiduciary," the defendant could have traveled to Louisiana from anywhere in the country any number of times and met with the Chairman throughout the state of Louisiana, and it would not have affected the outcome of the case. *Id.* Instead, the fact that the Chairman was neither a "private fiduciary," nor a "public official," meant that he could be bribed with impunity under Louisiana's state laws and those laws could not serve as a predicate for a Travel Act violation. *Id.*

Similarly, in *United States v. Brown*, because the Deputy State Highway Commissioner was not legally capable of accepting a bribe under the West Virginia law at issue, no degree of contact with West Virginia, and no amount of travel between West Virginia and any other

state could have made the defendant's conduct illegal. 505 F. 2d at 262. Finally, in *United States v. Fernandez*, the allegedly unlawful conduct centered almost entirely around Puerto Rico – the territory whose law was the predicate for the Travel Act count. 722 F.3d 1. Among other things, the target of the bribe was a member of the Commonwealth's Senate, the reason for the bribe was to secure the passage of legislation in the Commonwealth, and the co-conspirators traveled from Puerto Rico to Las Vegas as part of the alleged bribery scheme. 722 F.3d at 6-7. However, none of those contacts mattered because Puerto Rico had repealed its bribery statute, so the conduct could not have violated the alleged predicate Puerto Rico law. *Id.* at 31-32.

In the instant case, the district court's focus on the role that travel to and contacts with the state of New Jersey played in the kickback conspiracy led to an erroneous result that is divorced from the critical question of whether a New Jersey physician can violate a duty of fidelity under New Jersey law through his practice of medicine in another state. If this conduct does not violate a duty of fidelity by a New Jersey physician as required by New Jersey's commercial bribery statute, no amount of contact with the state of New Jersey can create liability for Dr.

Malik and the district court should not have maintained jurisdiction over his case.

## CONCLUSION

Dr. Malik's participation in the kickback scheme at the center of this case violated a number of federal laws. However, because New Jersey's commercial bribery statute does not reach Dr. Malik's practice of medicine in the state of Maryland, he could not have violated the Travel Act. Therefore, the district court never had jurisdiction over the Travel Act counts and it erred in denying Dr. Malik's motion to dismiss the indictment. This Court should vacate the Travel Act convictions and remand this case to the district court for resentencing.

Respectfully submitted,

JAMES WYDA
Federal Public Defender
/S/
JOANNA SILVER
Assistant Federal Public Defender
3411 Ivy Lane
Greenbelt, Maryland 20770

Counsel for Appellant

## STATEMENT REGARDING ORAL ARGUMENT

Counsel for Appellant respectfully requests oral argument so that the issues above can be more fully presented for the Court's consideration.

/S/ Joanna Silver

JOANNA SILVER
Assistant Federal Public Defender

**CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND LENGTH LIMITATIONS**

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/S/
Signature of Filing Party

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of May, 2019, I electronically filed the foregoing Brief of Appellant with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users: Jefferson Gray, Assistant United States Attorney, Office of the United States Attorney, 36 S. Charles Street, 4th Floor, Baltimore, Maryland, 21201.

/S/
JOANNA SILVER
Assistant Federal Public Defender

# APPENDIX A5

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

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA,** | * | |
| | * | |
| **Appellee,** | * | |
| | * | |
| **v.** | * | **Appeal No. 18-4688** |
| | * | |
| **ATIF BABAR MALIK,** | * | |
| | * | |
| **Appellant.** | * | |

* * * * * * * * * * * * * *

**RESPONSE IN OPPOSITION TO THE GOVERNMENT'S MOTION TO STAY THE BRIEFING SCHEDULE AND DISMISS DR. MALIK'S APPEAL**

Appellant Atif Malik, by and through undersigned counsel, opposes the United States' Motion to Dismiss his appeal and asks this Court to allow the briefing in this case to proceed as scheduled. Dr. Malik raised one argument in his opening brief: the district court erred in denying his motion to dismiss because his alleged course of conduct fell outside the reach of the New Jersey commercial bribery statute and could never have violated the charged Travel Act offenses. Should this Court agree, then the district court never had jurisdiction over Dr. Malik's case and he is actually innocent of the Travel Act offenses for which he stands convicted. These are defects that cannot be waived and therefore, regardless of how unfair it might be to the government, the appellate waiver in Dr. Malik's plea agreement cannot prevent him from raising his argument with this Court on appeal. For this reason, Dr. Malik respectfully asks this Court to deny the government's motion to dismiss his appeal and allow the briefing to continue as scheduled.

## I. Summary of the Argument Set Forth in Dr. Malik's Opening Brief

Dr. Malik summarized the procedural and factual history of his case in his opening brief. Dr. Malik presented the following summary of his argument: Dr. Atif Malik was convicted of a number of offenses arising from a scheme in which he and other men affiliated with a medical practice in

Maryland received money from a laboratory in New Jersey in exchange for sending their Maryland patients' urine to that laboratory for testing. This appeal concerns the narrow issue of whether the district court erred in maintaining jurisdiction over the offenses charged under 18 U.S.C. §1952, the Travel Act.

The Travel Act prohibits travel in interstate commerce or the use of the mail or another facility in interstate commerce with the intent to distribute the proceeds of, further, or carry on any unlawful activity. The unlawful activity—a violation of a state extortion, bribery, or arson statute—is an element of the Travel Act offense and where it is legally impossible for the alleged activity to violate the underlying state law, a Travel Act charge cannot stand.

The underlying state law charged in Dr. Malik's indictment is New Jersey's commercial bribery statute, which prohibits the solicitation or acceptance of any benefit as consideration for knowingly violating or agreeing to violate a duty of fidelity; in this case, Dr. Malik's duty as a physician. However, it is legally impossible for Dr. Malik to have violated this law because the only practice of medicine alleged by the government in this case took place in the state of Maryland.

The New Jersey commercial bribery statute does not prohibit physicians licensed in New Jersey from accepting a benefit in exchange for consideration given while practicing medicine in another state. The district court recognized this, describing the duty of fidelity under New Jersey law as "not fully defined," and failing to cite a single authority in support of its decision to reject Dr. Malik's motion to dismiss the indictment. The district court's decision to interpret the undefined duty of fidelity in New Jersey's law in a manner that is adverse to Dr. Malik violates the rule of lenity; it made Dr. Malik responsible for a violation of a statute with uncertain terms and allowed the district court to define a New Jersey legal standard that neither New Jersey's courts nor its legislature have defined themselves.

That Dr. Malik, his co-conspirators, and the kickback scheme itself had significant ties to New

Jersey cannot create liability under the New Jersey commercial bribery statute. While connections with another state are required for the interstate commerce nexus element of a Travel Act offense, the violation of an underlying state law is an element that must be separately alleged and proven. As other cases analyzing the Travel Act reveal, even the most ethically or morally repugnant conduct may not sustain a Travel Act charge if that conduct does not violate the predicate state law. In this case, there are many bases for criminal liability for Dr. Malik's conduct, but the Travel Act is not one of them. As a result, the district court erred in denying Dr. Malik's motion to dismiss the indictment. The district court never had jurisdiction over the Travel Act charges and therefore this Court must vacate Dr. Malik's Travel Act convictions and remand the case for resentencing.

Contrary to the characterization provided in the government's motion to dismiss, Dr. Malik did not argue that the indictment against him failed to state an offense. Rather, he argued that the indictment affirmatively alleged conduct that falls outside the reach of the Travel Act statute under which he was charged and ultimately convicted.

## II. Courts Lack Subject Matter Jurisdiction When Alleged Conduct Falls Outside the Scope of the Charged Statute

When a defendant pleads guilty, he waives the right to challenge most defects in the proceedings against him; however, a defendant can never waive a challenge to a jurisdictional defect. *See United States v. Brown*, 752 F. 3d 1344, 1347 (11th Cir. 2014); *United States v. Peter*, 310 F. 3d 709, 712 (11th Cir. 2002) ("Since jurisdictional error implicates a court's power to adjudicate the matter before it, such error can never be waived by parties to litigation."). A jurisdictional defect exists "when the indictment affirmatively alleges conduct that does not constitute a crime at all because that conduct falls outside of the sweep of the charging statute." *Brown*, 752 F. 3d at 1352 (*citing, Peter*, 752 F. 3d at 715). When such a defect exists, "proof of the alleged conduct, no matter how overwhelming, would [bring] it no closer

to showing the crime charged than would . . . no proof at all." *Peter*, 752 F. 3d at 715.

"The problem [with such defect] is not that the government failed to allege a fact or an element that would have made the indictment's criminal charge complete. Instead, 'it is that the Government affirmatively alleged a specific course of conduct that is outside the reach of the [statute charged].'" *Brown*, 752 F. 3d at 1352 (citing, *Peter*, 752 F. 3d at 715); *see also United States v. Vargas*, 563 Fed. Appx. 684, at *686 (11th Cir. April 17, 2014) ("Indictments that affirmatively allege conduct that does not represent a federal offense contain jurisdictional defects because Congress's grant of jurisdiction to the district courts in criminal cases extends only to offenses against the laws of the United States,")(citation and internal quotation marks omitted).

In Dr. Malik's case, if he succeeds in arguing that the practice of medicine in the state of Maryland cannot violate the fiduciary duty of a physician under New Jersey's commercial bribery statute, then his conduct, as alleged, will fall outside the sweep of the Travel Act. This is not a failure to state an offense through an omission, which was the basis of the Supreme Court's holding in the primary case the government relies on, *United States v. Cotton*, 535 U.S. 625, 631 (2002) ("Freed from the view that indictment omissions deprive a court of jurisdiction, we proceed to apply the plain-error test.").

Lower courts applying *Cotton* vary in the breadth with which they interpret it, though the majority involve omissions of required elements or factual allegations. For example, in *United States v. Rubin*, 743 F.3d 31 (2nd Cir. 2014), the defendant argued that the indictment omitted an allegation that he had actual knowledge and control of bets and wagers, as is required for a financial transaction provider to incur liability under the Unlawful Internet Gambling Enforcement Act of 2006. The Second Circuit held that this argument was not jurisdictional in nature. *Rubin*, 743 F.3d at 39. Similarly, the First Circuit applied *Cotton's* holding that "an indictment's factual insufficiency does not deprive a federal court of subject matter jurisdiction" to an argument that an indictment failed to include an

allegation that he accepted bribes or kickbacks in an honest-services fraud prosecution. *United States v. George*, 676 F.3d 249 (1st Cir. 2012). The First Circuit held that the omission of a fact that is required for a finding of guilt did not deprive the district court of jurisdiction over the case. *See id.* at 260; *see also*, *United States v. Scruggs*, 714 F.3d 258 (5th Cir. 2103) (rejecting an argument that the failure to allege the making or taking of a bribe in an honest services fraud indictment divested the court of subject matter jurisdiction).

The Tenth Circuit decision in *United States v. De Vaughan* is the only case relied on by the government that expressly broadens *Cotton's* holding beyond indictment omissions, rejecting the above-cited Eleventh Circuit decision in *United States v. Peter*, as "overly narrow." 694 F. 3d 1141, 1148 (10th Cir. 2012), citing, *Peter*, 310 F. 3d 709. However, it is *De Vaughan* that overstates the breadth of *Cotton's* holding, and it is the reasoning in *Peter* that this Court should apply to Dr. Malik's appeal.

In *Peter*, the Eleventh Circuit recognized that *Cotton* rejected the view that "all indictment defects are 'jurisdictional.'" *Peter*, 310 F.3d at 713, *citing, Cotton*, 535 U.S. 625, 122 S.Ct at 1785. However, its analysis of *Cotton* did not lead it to the extreme view urged by the government that *no* indictment defects are jurisdictional. *Peter* began by recognizing that *Cotton* framed the question presented as whether "the *omission* from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeals' vacating the enhanced sentence." *Peter*, 310 F.3d at 713, *citing, Cotton*, 535 U.S. 625, 122 S.Ct at 1783 (emphasis added). The court then delved into the facts of *Cotton*, noting that the indictment in *Cotton* "unquestionably described the offense of conspiring to distribute and to possess with intent to distribute cocaine;" it merely omitted information about threshold drug quantities that were relevant to sentencing. *Peter*, 310 F.3d at 714. Most important, *Peter* concluded that "the Supreme Court did not address whether the insufficiency of an indictment assumes a jurisdictional dimension when the only facts it alleges . . . describe conduct that is not proscribed by the charging statute." *Id.*

In the instant case, Dr. Malik does not argue that the indictment fails to allege an essential element of a Travel Act offense. To the contrary, Dr. Malik acknowledges that the indictment sets forth all of the required elements of a Travel Act offense. However, the indictment then describes conduct that could never, no matter how overwhelming the proof, satisfy those required elements. As in *Peter*, and unlike in *Cotton*, "[t]he problem is not that the Government's case left unanswered a question as to whether its evidence would encompass a particular fact or element. Rather, it is that the Government affirmatively alleged a specific course of conduct that is outside the reach of the [Travel Act] statute." *Id.* at 715. "[Dr. Malik]'s innocence of the charged offense appears from the very allegations made in the superseding information, not from the omission of an allegation requisite to liability." *Id.*

This is very different from the situation contemplated by the Supreme Court in *Cotton*. This Court should follow the lead of the Eleventh Circuit in recognizing this fact. While *Cotton* holds that some indictment defects are not jurisdictional, it does not hold that all indictment defects are not jurisdictional. Here, the district court never did, and never can, have jurisdiction to hear Dr. Malik's case. This is a defect that Dr. Malik cannot waive, and therefore this Court should permit his appeal to move forward.

## II. A Defendant Can Never Waive a Claim of Actual Innocence

While claims of actual innocence are closely related to claims of a jurisdictional defect, the clear and compelling law exempting actual innocence claims from the scope of an appellate waiver provides a separate reason for this Court to allow Dr. Malik's appeal to proceed. This Court has long held that it will refuse to enforce an otherwise valid appeal waiver if to do so would result in a miscarriage of justice. *See, e.g., United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005). Additionally, this Court recognizes that, "[a] proper showing of 'actual innocence' is sufficient to satisfy the 'miscarriage of justice' requirement." *Wolfe v. Johnson*, 565 F. 3d 140, 160 (4th Cir. 2009).

Applying this rule of law in *United States v. Adams*, 814 F. 3d 178, 182-83 (4th Cir. 2016), this Court concluded that a claim of actual innocence based on a change in law involving the predicate offense for a conviction under 18 U.S.C. §922(g) fell outside the scope of an appeal waiver. *Adams* involved an argument that under this Court's decision in *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011), none of the defendant's prior criminal convictions were felonies, and thus he could not have been guilty of the offense of being a felon in possession of a firearm in violation. *Adams*, 814 F. 3d at 181.

This Court reviewed the appellate waiver contained in the plea agreement underlying Mr. Adams' §922(g) conviction and concluded that it was valid and that Mr. Adams had entered it knowingly and voluntarily. *Id.* at 182. This Court then reviewed its previous holding in *Miller v. United States*, 735 F.3d 141 (4th Cir. 2013), in which it held that when defendants' prior convictions do not qualify as predicate felonies after *Simmons*, they are "*actually innocent of the §922(g)(1) offense of which they were convicted*." *Adams*, 814 F. 3d at 182, emphasis in original. Noting that Mr. Adams' claim was the same as the defendant's in *Miller*, this Court concluded that Mr. Adams was making a valid claim of actual innocence and that, "[t]herefore, in keeping with our precedent and to prevent a miscarriage of justice, we conclude Adams' claim is outside the scope of his appeal waiver." *Id.* at 183.

Despite the government's attempts to distinguish them, *Adams*, along with *Miller* and *Bousley v. United States*, 523 U.S. 614 (1998) support the maintenance of Dr. Malik's appeal. Dr. Malik argues that the facts alleged in his indictment can never make out a Travel Act violation. It was these same facts that were presented to the jury and upon which the jury found Dr. Malik guilty. Thus, Dr. Malik was convicted of offenses of which he is actually innocent. While *Adams*, *Miller*, and *Bousley* all involve actual innocence claims stemming from a post-trial change of law, nothing in those opinions suggest that this is the only way in which actual innocence may be asserted. At the time of Dr. Malik's trial,

New Jersey's commercial bribery statute did not criminalize the acceptance of kickbacks by a New Jersey physician in exchange for his practice of medicine in another state. There have been no developments since then that have made him any more or less innocent of the charges for which he stands convicted. If this Court agrees with this assertion, then Dr. Malik will be actually innocent of the Travel Act offenses. "Therefore, in keeping with [this Court's] precedent and to prevent a miscarriage of justice," this Court must find that Dr. Malik's claim falls outside of his appeal waiver. *Id.*

While this outcome may seem unfair to the government, such concerns cannot take precedent over the principle that a person "should not remain convicted of a crime of which he is . . . actually innocent. *Adams*, 814 F. 3d at 185. This Court made this point perfectly clear in *Adams* when it admonished the government not to follow through on its threat to reinstate dismissed counts against Mr. Adams and seek to add additional years to his current sentence as a result of this Court's vacatur of the §922(g) offense. *Id.* at 184-85. This Court accused the government of "tread[ing] dangerously close to punishing Mr. Adams for pursuing what we have ultimately determined to be a meritorious claim of actual innocence," and reminded it that, [j]ust as the criminal justice system must see the guilty convicted and sentenced to a just punishment, so too it must ferret out and vacate improper convictions." *Id.* Thus, regardless of the bargain struck between Dr. Malik and the government, his appeal based on a claim of actual innocence must be heard by this Court.

Respectfully submitted this 16th day of May, 2019.

JAMES WYDA
Federal Public Defender

/s/ Joanna Silver
JOANNA SILVER
Assistant Federal Public Defender
6411 Ivy Lane

Greenbelt, Maryland 20770
(301)344-0600

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 16, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user: Assistant United States Attorney, Jefferson M. Gray, Office of the United States Attorney, 36 S. Charles Street, 4th Floor, Baltimore, Maryland 21201..

/s/ Joanna Silver
JOANNA SILVER
Assistant Federal Public Defender

# APPENDIX A6

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

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA** | ) | |
| | ) | |
| **v.** | ) | **CASE NO. 18-4688** |
| | ) | |
| **ATIF BABAR MALIK,** | ) | |
| | ) | |
| ***Defendant-Appellant.*** | ) | |
| | ) | |

**THE UNITED STATES OF AMERICA'S REPLY TO APPELLANT MALIK'S RESPONSE TO THE GOVERNMENT'S MOTION TO ENFORCE HIS PLEA AGREEMENT'S APPELLATE WAIVER**

The Government states the following in reply to the Office of the Federal Public Defender's (OFPD) response to the Government's motion to enforce the appellate waiver in appellant Malik's plea agreement and dismiss this appeal.

## ARGUMENT

### I. THE ELEVENTH CIRCUIT PRECEDENT RELIED UPON BY APPELLANT IS INCONSISTENT WITH *UNITED STATES v. COTTON* AND SEVERAL OTHER DECISIONS OF THE UNITED STATES SUPREME COURT, AS WELL AS THAT OF EVERY OTHER CIRCUIT COURT THAT HAS RECENTLY CONSIDERED WHETHER AN ALLEGED FAILURE TO STATE AN OFFENSE IS JURISDICTIONAL IN NATURE

In arguing that his challenge to his convictions under the Travel Act is jurisdictional in nature, appellant Malik relies exclusively on *United States v. Peter*, 310 F.3d 709 (11th Cir. 2002) and two other Eleventh Circuit decisions,

*United States v. Brown*, 752 F.3d 1344, 1347 (11th Cir. 2014) and *United States v. Vargas*, 563 Fed. Appx. 684 (11th Cir. April 17, 2014). This Court did not find these authorities persuasive when they were cited by the OFPD in its response (ECF # 25, filed March 14, 2019) to the Government's motion to dismiss in *United States v. Kodi Johnson*, Appeal No. 18-4780 (4th Cir. May 15, 2019) (per curiam) (unpublished), in which this Court recently enforced the defendant's appellate waiver and dismissed his appeal. ECF # 32. The same result is mandated here.

The Eleventh Circuit's holding in *Peter* is inconsistent with not only with the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625, 630-31 (2002), which it purports to follow, but also with *United States v. Williams*, 341 U.S. 58, 66, 68-69 (1951) ("Though the trial court or an appellate court may conclude that . . . the facts stated in the indictment do not constitute a crime or are not proven, it has proceeded with jurisdiction"); *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not a dismissal for want of jurisdiction"); and *Lamar v. United States*, 240 U.S. 60 (1916) (Holmes, J.) (noting that "The objection that the indictment does not charge a crime against the United States goes only to the merits of the case," and does not affect the district court's subject matter jurisdiction). *Williams* and *Lamar* were expressly cited and relied upon by the

Supreme Court in *Cotton*. 535 U.S. at 630-31.[1] Moreover, *Peter* is unpersuasive when compared to the contrary authorities previously cited by the Government in its motion to dismiss from the First, Second, Fifth, Sixth, Seventh, and Tenth circuits. *See United States v. Rubin*, 743 F.3d 31 (2d Cir. 2014) (noting that *Cotton*, *Lamar*, and *Williams* together "confirm that challenges to an indictment on the basis that the alleged conduct does not constitute an offense under the charged statute are also non-jurisdictional challenges"); *United States v. Scruggs*, 714 F.3d 258, 263 & n.24 (5th Cir. 2013) (an indictment's alleged failure to state an offense is not jurisdictional in nature); *United States v. De Vaughan*, 694 F.3d 1141, 1147-49 (10th Cir. 2012) (*Cotton*'s holding that indictment defects are not jurisdictional applies to both omissions of required elements and to claims that the indictment did not charge a federal offense); *United States v. Vanwinkle*, 645 F.3d 365, 369 (6th Cir. 2011) (a claim that an indictment fails to state an offense does not deprive the district court of subject matter jurisdiction); *United States v. George*, 676 F.3d 249, 260 (1st Cir. 2012) (even if an indictment's allegations were factually insufficient, that "did not divest the district court of subject matter jurisdiction"); *United States v. Gonzalez*, 311 F.3d 440, 443 (1st Cir. 2002); *Hugi v. United*

[1] Significantly, none of the Eleventh Circuit decisions (*Peter*, *Brown*, and *Vargas*) relied upon by appellant ever cites, quotes, or discusses *Lamar*, *Williams*, and *Bell* in any way, or reflects any awareness of their reasoning and holdings.

*States*, 164 F.3d 378, 380-81 (7th Cir. 1999). To these cases, we may now further add the Eighth Circuit's decision in *United States v. Todd*, 521 F.3d 891 (8th Cir. 2008), in which that court overruled its previous precedent treating an indictment's failure to state an offense as jurisdictional and instead now held that a challenge to the sufficiency of the indictment "does not raise a jurisdictional defect . . . ." *Id.* at 895 (citing *Cotton*). In addition, in *United States v. Velasco-Medina*, 305 F.3d 839, 846 (9th Cir. 2002), the Ninth Circuit cited both *Cotton* and quoted *Lamar* in holding that a defendant's claim that an indictment failed to properly charge a federal offense did not deprive the district court of subject matter jurisdiction. Finally, in an unpublished decision, this Court itself relied upon *Cotton* in holding that "To the extent [a defendant] challenges the indictment, defects in an indictment are not jurisdictional," and a valid guilty plea therefore "waive[s] this alleged non-jurisdictional defect." *United States v. McGrier*, 322 Fed. Appx. 303, 304 (4th Cir. April 20, 2009).

The Eleventh Circuit decided *Peter* about five months after *Cotton*. Clearly influenced by the older Fifth Circuit precedent of *United States v. Meacham*, 626 F.2d 503, 510 (5th Cir. 1980), which had held that a district court is without subject matter jurisdiction over a "non-offense," 310 F.3d at 713-15, the *Peter* court read *Cotton* very narrowly, holding that it applied only to charges in an

indictments that were "defective" because they omitted a necessary factual allegation, and not to charges that failed to state a claim because the conduct alleged fell outside the scope of the statute charged. 310 F.3d at 714. Based on this restrictive reading of *Cotton*, the Eleventh Circuit determined that *Meacham* remained valid and was therefore controlling. 310 F.3d at 713-15.[2]

But the Eleventh Circuit's narrow reading of *Cotton* is actually not supported by the Supreme Court's unanimous decision, as both the Fifth and the Tenth Circuits recognized in subsequent decisions rejecting *Peter*.[3] *See Scruggs*, 714 F.3d at 264 ("*Peter* was wrongly decided and cannot be squared with *Cotton*."); *De Vaughan*, 694 F.3d at 1147-48 (describing *Peter*'s holding as "surprising[]" and concluding, "We are not persuaded by *Peter*'s overly narrow reading of *Cotton*."). In explaining what it meant by "defects in an indictment,"

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[2] The two other Eleventh Circuit precedents cited by appellant's response – *United States v. Brown*, 752 F.3d 1344 (11th Cir. 2014) and *United States v. Vargas*, 563 Fed. Appx. 684 (11th Cir. April 17, 2014) – add nothing to *Peter*. Even aside from the fact that *Brown* relied upon both *Peter* and *Meacham*, 752 F.3d at 1352-1353, both *Brown* and *Vargas* each involved an omission of an element from an indictment, which *Peter* had conceded was a non-jurisdictional defect. The Eleventh Circuit therefore found that the defendants' guilty pleas had waived their rights to challenge their convictions. *Brown*, 752 F.3d at 1353-54; *Vargas*, 563 Fed. Appx. at 686.

[3] Indeed, *no* other circuit court has read *Cotton* the same way that the Eleventh Circuit did in *Peter*.

the unanimous Court in *Cotton* cited and relied upon Justice Holmes's earlier decision for another unanimous Supreme Court in *Lamar*, which expressly found that a claim that the indictment failed to state a federal offense "goes only to the merits of the case" and was non-jurisdictional in character. *Cotton*, 535 U.S. at 630-31, *quoting Lamar*, 240 U.S. at 65. The *Cotton* court also cited and relied upon *Williams*, which likewise did not involve an omission of a required element from an indictment. *Id.* In interpreting *Cotton*, in contrast, the Eleventh Circuit in *Peter* wholly ignored its discussion of these two binding Supreme Court precedents and did not address either of them, as the Tenth Circuit witheringly pointed out in *De Vaughan*, 694 F.3d at 1148 ("Most importantly, *Peter* overlooks the cases *Cotton* relied on for its holding – *Lamar* and *Williams*."). For the same reason, *De Vaughan* rejected *Peter*'s effort (310 F.3d at 715, which is duplicated by the appellant here, see ECF # 38 at 5) to hang its hat on the fact that *Cotton* described the question presented there as "whether the omission from a federal indictment of a fact that enhances the statutory maximum justifies a court of appeals' vacating the enhanced sentence . . . ." 535 U.S. at 627. As the *De Vaughan* court pointed out, however, "Although *Cotton* framed the *question presented* in terms of indictment omissions, the Court did not limit its *holding* to omissions." 694 F.3d at 1148 (emphasis in original). Instead, the Supreme Court

in *Cotton* made clear, in the course of overruling *Ex parte Bain*, 121 U.S. 1 (1887), that its precedents dating back to *Lamar* established "that defects in an indictment do not deprive a court of its power to adjudicate a case." *Cotton*, 535 U.S. at 630.

In contrast to the Eleventh Circuit in *Peter*, which decided to reaffirm the continuing validity of the old, pre-Fifth Circuit-split precedent of *Meacham* notwithstanding *Cotton*, the current Fifth Circuit in *United States v. Cothran*, 302 F.3d 279 (5th Cir. 2002) – a decision handed down almost three months before *Peter* – easily recognized that *Meacham*'s holding that an attack on the factual sufficiency of a criminal charge raises a "jurisdictional" challenge was inconsistent with *Cotton*, which had now established that "defects in the indictment are not jurisdictional." *Id.* at 283; *see also Scruggs*, 714 F.3d at 263 & n.24 ("In light of *Cotton*, we have disavowed *Meacham*'s 'classif[ication] as jurisdictional the requirement that an indictment state an offense.'"). But *Peter* did not cite *Cothran*, and betrayed no awareness that its sibling court had already repudiated *Meacham* in light of *Cotton*.

Appellant's efforts to distinguish the other circuit decisions cited by our original motion to dismiss are unavailing. Appellant suggests that *Rubin*, *George*, and *Scruggs* "involve omissions of required elements or factual allegations," ECF # 38 at 4, in an apparent attempt to suggest that they are not necessarily

inconsistent with *Peter*, which sought to limit *Cotton* to cases involving omissions of a required element of an offense. In fact, however, all three of these cases involved claims by the appellants that the indictments against them failed to state an offense or charged a "non-offense" – the exact claim that Malik seeks to present here. Rubin contended that he was convicted of a "non-offense" because he maintained that the statute under which he was charged did not apply to his actions as a "financial transaction provider . . . ." 743 F.3d at 35-36. *Scruggs* and *George* both involved claims that the honest services charges under which those defendants were convicted were factually insufficient post-*Skilling v. United States*, 561 U.S. 358 (2010), because they did not allege that they had accepted bribes or kickbacks, and therefore likewise charged a "non-offense." *Scruggs*, 714 F.3d at 262-63; *George*, 676 F.3d at 259-60. There is thus no material difference between the nature of Malik's factual insufficiency claim and those advanced by the defendants in *Rubin*, *Scruggs*, and *George*.

In an apparent attempt to obscure this point, appellant's response actually states that "Contrary to the characterization provided in the government's motion to dismiss, Dr. Malik did not argue that the indictment against him failed to state an offense. Rather, he argued that the indictment affirmatively alleged conduct that falls outside the reach of the Travel Act statute . . . ." ECF # 38 at 3. But not

only is that a distinction without a difference; it is flatly untrue. The *very first paragraph* of Malik's motion to dismiss the Travel Act counts in the district court stated that "the Travel Act Charges *fail to state an offense*, because they do not properly allege a violation of New Jersey state law . . . ." Crim. No. MJG-16-0324, ECF # 162, at 1 (emphasis added).

Accordingly, this Court should follow the Supreme Court's long-established precedents and the decisions of the First, Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits and hold that a claim that a criminal charge failed to state an offense is non-jurisdictional in nature.

## II. APPELLANT MALIK HAS NOT PRESENTED A VALID CLAIM OF ACTUAL INNOCENCE

As we pointed out in our original motion to dismiss, an "actual innocence" claim is normally raised in the habeas context, and requires a showing that absent the constitutional error of which the defendant complains, in light of all the evidence, "it is more likely than not that no reasonable juror would have convicted him." *Bousley v. United States*, 523 U.S. 614, 623 (1998), *quoting Schlup v. Delo*, 513 U.S. 298, 327-328 (1995). As appellant has to concede, however, the "actual innocence" cases on which he relies – *Bousley*, *United States v. Adams*, 814 F.3d 178 (4th Cir. 2016) and *Miller v. United States*, 735 F.3d 141 (4th Cir. 2013) – "all

involve actual innocence claims stemming from a post-trial change in the law," and no similar change in the law has occurred here.

That is fatal to his claim, as *United States v. Morgan*, 230 F.3d 1067 (8th Cir. 2000) demonstrates. In *Morgan*, a defendant charged with violating the Federal Program Bribery Act (18 U.S.C. § 666) initially filed a motion contending that these charges failed to state an offense because the indictment did not allege that his conduct had affected the expenditure of the federal funds or posed a threat to the integrity of a federal program. When his motion was denied, the defendant pled guilty and agreed to waive his appellate rights.

Subsequently, however, the Supreme Court decided *Salinas v. United States*, 522 U.S. 52, 61 (1997). While *Salinas* resolved some of the issues raised by his pre-trial motion definitively against him, the defendant viewed it as providing some support for one of the arguments he had earlier unsuccessfully raised. He therefore challenged his convictions under 28 U.S.C. § 2255. The district court denied his petition and the Eighth Circuit affirmed its decision, pointing out that:

> Unlike the situation faced in *Bousley* after *Bailey* clarified the meaning of use in § 924(c), there is no definitive announcement in *Salinas* clarifying the elements of § 666. There is no intervening controlling precedent between the time of Morgan's guilty plea and collateral proceedings that has clearly established Morgan's actions do not constitute a crime and thus that he is actually innocent of the charged offense. Because the Supreme Court in *Salinas* no more than suggested the requirement Morgan asserts is absent in his case,

> Morgan cannot show that "it is more likely than not that no reasonable juror would have convicted him."

*Id.* at 1070, *quoting Bousley*, 523 U.S. at 623. The same considerations apply here – except that defendant Malik cannot even point to an intervening Supreme Court or other decision that so much as "suggests" that his unsuccessful challenge to the Travel Act counts in the district court was actually meritorious.

Thus, Malik has advanced no colorable justification for allowing him to now revisit the district court's earlier decisions sustaining the Travel Act counts, notwithstanding his agreement to an appellate waiver that barred him from further contesting any of his trial convictions on the ground that the conduct alleged "does not fall within the scope of the statute." Exh. 1, ECF # 23, ¶ 16(a).

## CONCLUSION

Near the end of its response, appellant's counsel acknowledges, but cavalierly dismisses, the obvious concern that allowing him to proceed with this appeal after he agreed to waive any appellate challenge to his trial convictions "may seem unfair to the government . . . ." ECF 38 at 8. The "may seem" are weasel words: the unfairness to the government here – where the defendant relied upon and benefitted at his sentencing before the district court from the perception that he had waived any appellate challenges to his trial convictions – is patent and

substantial. This Court has recognized that "Plea bargains rest on contractual principles, and each party should receive the benefit of its bargain." *United States v. Ringling*, 988 F.2d 504, 506 (4th Cir. 1993); *see also United States v. Blick*, 408 F.3d 162, 173 (4th Cir. 2005) (allowing a defendant to raise issues on appeal despite his appellate waiver "would unfairly deny the United States an important benefit of its bargain"). Because the scope of the appellate waiver provision here "is an important recurring issue that needs to be resolved," *Gonzalez*, 311 F.3d at 444, and because the overwhelming weight of precedent supporting the government's position is so clear, the Government urges this Court not only to enforce the waiver and dismiss this appeal, but to do so in a published decision.

Respectfully submitted,

ROBERT K. HUR
UNITED STATES ATTORNEY

/s/

By: _____

Jefferson M. Gray
Assistant United States Attorney
U.S. Attorney's Office
36 S. Charles Street, 4th Floor
Baltimore, Maryland 21201
(410) 209-4915

Date: May 23, 2019

## CERTIFICATE OF COMPLIANCE

1. This motion has been prepared using:

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2. EXCLUSIVE of the title of the brief, the list of exhibits, the statement with respect to oral argument, and the certificate of service, this brief contains **2,589** words.

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/s/

Jefferson M. Gray
Assistant United States Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of May 2019, a copy of the foregoing The United States of America's Reply to Appellant Malik's Response to the Government's Motion to Enforce his Plea Agreement's Appellate Waiver, and Dismiss this Appeal was served by means of the Court's CM/ECF system upon Ms. Joanna Silver, Assistant Federal Public Defender, Federal Public Defender's Office, 6411 Ivy Lane, Suite 710, Greenbelt, Maryland 20770.

/s/

Jefferson M. Gray
Assistant United States Attorney